Supreme Court, U.S.
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No. ________ OFFICE OF THE CLERK

In The Supreme Court of The United States

ROBERT MELANCON,

Petitioner,

v.

KELLY WARD, WARDEN-DAVID WADE
CORRECTIONAL CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit err in summarily denying Petitioner relief under 28 U.S.C. § 2254(d), where Petitioner was denied a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution due to jury bias occasioned by the highly inflammatory and prejudicial pre-trial publicity which saturated the community from which the jury was drawn?

2. Was Petitioner denied a fair trial by an impartial jury in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution as a result of the saturation of the community from which the jury was drawn with the pervasive inflammatory and prejudicial publicity of a civil settlement within four days prior the commencement to his criminal trial by Petitioner's "boss" and employer of nearly identical claims which formed the basis for the criminal charges against Petitioner?

Parties to the Proceedings in the Court Whose Judgment is Sought to be Reviewed

Robert Melancon	Petitioner – Appellant
Kelly Ward, Warden David Wade Correctional Center	Respondent - Appellee

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED ii

TABLE OF AUTHORITIES iv

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE 3

STATEMENT OF THE CASE 11

REASONS FOR GRANTING THE WRIT 16

ARGUMENT 19

CONCLUSION 32

APPENDIX 33

TABLE OF AUTHORITIES

Page

Cases

Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961) 19, 24

Mayola v. Alabama, 623 F.2d 992 (5th Cir. 1980) 27

Murphy v. Florida, 421 U.S. 794 (1975) 27, 29

Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966) 27

Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed. 2d 420 (1966) 24

Rideau v. Louisiana, 373 U.S. 723 (1963) 17, 18, 25, 26, 27, 28, 29, 30, 31

River Oaks Health Systems D/B/A Woman's Hospital v. Steptoe-Finley, et al., No. 2004-IA-01309-SCT, 2004 WL 3115061 (Miss.) 16, 17

Sheppard v. Maxwell, 384 U.S. 333 (1966) 29

Skilling v. United States, 561 U.S. ___ (2010) 27, 28, 29, 30

United States v. Capo, 595 F.2d 1086 (5th Cir. 1979) 27

United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) 27

Williams v. Taylor, 529 U.S. 362 (2000) 25

Statutes

28 U.S.C. § 1254 .... 2, 6

28 U.S.C. § 2254 6

28 U.S.C. § 2254(d)... i

28 U.S.C § 2254(d)(1) 25

28 U.S.C. § 2254(d)(2) 25

28 U.S.C. § 2254(e)(1) 25

Constitutional Provisions

U.S. Const. Amend. V 3

U.S. Const. Amend. VI 3

U.S. Const. Amend. XIV 4

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE

Melancon v. Ward, 2010 WL 1287833, C.A.5 (La.), April 05, 2010 (NO. 08-30950)

Melancon v. Ward, 2008 WL 2559286, E.D.La., June 24, 2008 (NO. CIV.A. 07-5877)

Melancon v. Ward, 2008 WL 782804, E.D.La., March 19, 2008 (NO. CIV.A. 07-5877)

Melancon v. Ward, 2008 WL 2811154, E.D.La., March 06, 2008 (NO. CIV.A. 07-5877)

State v. Melancon, 751 So.2d 243 (La. 12/10/99)

State v. Melancon, 959 So.2d 502 (La. 2007)

State v. Melancon, 739 So.2d 1017 (La. App. 1 Cir. 1999)

State v. Melancon, Case No. 264,226, 32nd Judicial District Court, Parish of Terrebonne, State of Louisiana

STATEMENT OF JURISDICTION

Petitioner seeks review of a decision rendered by the United States Court of Appeals for the Fifth Circuit in an unpublished opinion on April 5, 2010, in which the Court of Appeals decided an important question of Federal law in a way that conflicts with relevant decisions of this Honorable Court. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

Petitioner, Father Robert Melancon, is a Roman Catholic priest who was convicted in Terrebonne Parish, Louisiana, of aggravated rape of a child under the age of twelve and sentenced to life imprisonment without the benefit of probation, parole or suspension of sentence.

The trial was held in an atmosphere of continuing and intense media publicity in the small community of Houma, Louisiana. Father Melancon was assigned to Annunziata Church in Terrebonne Parish in 1985. The alleged victim, K.P., began serving as an altar boy the year after Father Melancon arrived. K.P. was eight years old at that time, and his duties as an altar boy involved assisting at Sunday Masses and occasionally at funerals, Baptisms and marriages. At some point in "the 80s", K.P.'s mother took him to a pediatrician, because he was complaining of constipation and blood in his stool. The pediatrician examined K.P. and determined that the bleeding was the result of constipation and prescribed treatment. K.P. did not return to the pediatrician with the complaint at any point in the future.

In 1993, another altar boy brought a civil lawsuit against the Roman Catholic Diocese of Houma-Thibodaux alleging that Father Melancon had molested him over a ten year period. This lawsuit and its subsequent $30,000 settlement were widely reported in the community by the local media. Shortly after the settlement of that lawsuit, K.P. traveled on a Church-sponsored trip to Disneyworld. During that trip, K.P. allegedly told a friend that he had been touched "in a wrong way" by another priest, Father J.M., Father Melancon's successor at Annunziata Church, and made no mention of Father Melancon.

In 1995, K.P. went to his high school guidance counselor and indicated that he was troubled, because he had been sexually abused by a priest. The alleged abuse was reported to the authorities, and K.P. received psychiatric treatment at an inpatient facility. K.P. subsequently gave statements to the police and filed a civil lawsuit against the Roman Catholic Diocese of Houma-Thibodaux alleging that Father Melancon was the priest who molested him. K.P.'s civil lawsuit, based upon nearly identical claims that formed the substance of the criminal charges against Father Melancon, was settled just four days prior to the commencement of Father Melancon's criminal trial for the extraordinary sum of $800,000.

The criminal case against Father Melancon was not only a source of much local outrage, but it was billed by the local media as the "ground zero of priestly pedophilia cases in the United States". Father Melancon's employer, the Roman Catholic Diocese of Houma-Thibodeaux, essentially was made a co-defendant with Father Melancon, and the local and national scrutiny was pervasive and inflammatory. Articles in the local media covered not only the history of the Roman Catholic Church in the area, but also discussed specific evidence in Father Melancon's case, including lurid notes by Father Melancon to one of the alleged victims.

In an effort to exercise his Constitutional right to a fair trial from an impartial jury, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Father Melancon filed a pretrial motion to change venue. Father Melancon presented the findings of a public opinion pollster who indicated that, based on his research, Father Melancon could not receive a fair trial in Terrebonne Parish. Sixty-six percent (66%) of the Terrebonne residents polled by the pollster could identify Father Melancon. Of these, a ratio of 2.3 to 1 had a negative opinion of him. More significantly, an astounding 5-to-1 ratio thought that Father Melancon was guilty. There is no question that the community already had formed its opinions based on the pervasive and prejudicial publicity, which not only linked Father Melancon to other, unrelated priest-sex scandals, but also dragged the Roman Catholic Church and other clergy through the mud in an attempt to discredit Father Melancon.

It was impossible for Father Melancon to receive a fair trial in Terrebonne Parish, not just because of the animosity toward him as a person, priest and representative of the entire Roman Catholic Church, but because so many of the prospective jurors had either religious or social ties to the principal participants in the case. The jury pool was further tainted by the personal experiences of the panelists. Father Melancon was charged with aggravated rape of a child under twelve, and almost one-third of the potential jurors interviewed during voir dire (19 out of 62) either had been victims of sexual abuse themselves or were closely related to someone who had been the victim of such abuse. As victims and as friends of victims, many of the potential jurors had very strong, personal feelings about the allegations against Father Melancon which made their objectivity questionable at best. No fair trial could result from this emotional connection and memory of a similar crime, when combined with the pervasive and highly prejudicial news coverage blanketing the community. Father Melancon's trial, held in an atmosphere of demonstrable prejudice and animosity, was a flagrant violation of well-established Constitutional principles of fundamental fairness and denied Father Melancon his Constitutionally-entitled due process.

Despite the glaring fact that the jury venire was infected by both the highly inflammatory and prejudicial pretrial publicity and their pervasive prior knowledge of the case, the trial court denied Father Melancon's motion for a change of venue, and after trial, the jury found Father Melancon guilty as charged of aggravated rape of a child under the age of twelve. Father Melancon was sentenced to life imprisonment without the benefit of probation, parole or suspension of sentence. The verdict was rendered despite the stunning paucity of inculpatory evidence. No physical evidence was presented by the State, and the only testimonial evidence offered tending to incriminate Father Melancon was that of the victim, who by his own admission had a faulty memory, as well as testimony from another alleged victim, whose testimony was vague, equivocal and, in many areas, contradicted by other, disinterested witnesses.

REASON FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari should be granted for the following reasons. The Fifth Circuit's decision to summarily affirm the district court's denial of Father Melancon's 28 U.S.C. § 2254 application conflicts with this Honorable Court's long-established precedents protecting state criminal defendant's Federal Constitutional right to a fair trial by an impartial jury. The lower courts' refusal to grant the Writ to correct the holding of the state court not only conflicts with this Honorable Court's precedent, it even conflicts with a decision of at least one other State and that decision was in a civil case. *River Oaks Health Systems D/B/A Woman's Hospital v. Steptoe-Finley, et al.*, No. 2004-IA-01309-SCT, 2004 WL 3115061 (Miss.).[1]

In *River Oaks*, the Supreme Court of Mississippi observed that,

> [o]rdinarily, a single newspaper article would not justify a change of venue. We would rely on the trial judge and counsel to closely question potential jurors during voir dire, and to excuse those who may have read the article or otherwise

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[1] This decision was issued on interlocutory review and not designated for publication. It is not being cited as precedent of the Mississippi Supreme Court, but to demonstrate the unreasonableness of the Louisiana court's conclusion that Father Melancon did not suffer from prejudicial pretrial publicity.

> been exposed to its content. For several reasons, however, this case is distinguishable.

The headline to the article in *River Oaks* did not directly refer to the defendant's case. The Court found this distinction irrelevant since the banner "tort reform" was sufficient to attract "great public interest."

The stories in Father Melancon's case are far more attractive of public interest and actual public outrage – invoking the rape of a child and the ongoing sex abuse scandal of the Roman Catholic Church.

The *River Oaks* Court singled out the "considerable emotion and sympathy" the article invoked for the plaintiff, plaintiff's counsel offering an opinion on evidence and providing the substance of testimony of a witness to be used at trail. A very clear analogy can be drawn from the heart-wrenching story of a brain damaged child to the story of a raped child.

Finally, the instant case is materially indistinguishable from the issues addressed by this Honorable Court in *Rideau v. Louisiana*, 373 U.S. 723 (1963). In *Rideau*, this Honorable Court reversed the conviction of a habeas petitioner whose confession had been filmed, recorded, and broadcast by the local television station to large audiences in the Louisiana civil parish from which the jury was drawn. Father Melancon's facts are analogous to those in *Rideau*. Through the settlement just four days before the commencement of his criminal trial of the civil claims which formed the basis for the charges in Father Melancon's criminal prosecution, Bishop Michael Jarrell and the Diocese of Houma-Thibodeaux essentially "confessed" that Father Melancon had engaged in the alleged improper conduct, and comparable to the facts in *Rideau*, the "confession" by the Bishop Jarrell and the Diocese added to the "carnival atmosphere" that pervaded the entire process and denied Father Melancon a trial with the solemnity and sobriety to which he was duly and justly entitled under any notion of fairness.

ARGUMENT

Petitioner may have fared better in the lower courts and the appellate courts if he had been charged with, and convicted of, murder, rather than aggravated rape of a child under the age of twelve. Few crimes are viewed by the public as more heinous than that with which the Petitioner, a Roman Catholic priest, was charged and convicted. This Honorable Court has noted, however, that a "fair trial in a fair tribunal is a basic requirement of due process" and that "[t]his is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961).

Father Robert Melancon is a Roman Catholic priest of the Roman Catholic Diocese of Houma-Thibodaux (the "Diocese") in Southeast Louisiana. The Diocese is comprised of all or portions of three civil parishes (counties), Lafourche, Terrebonne and part of St. Mary. The total number of people in the canonical jurisdiction of the Diocese is approximately 200,000, of which 100,000, or 50%, are either practicing or nominal members of the Roman Catholic Church. There are thirty-nine Church parishes to serve the Roman Catholics in the Diocese, an average of 2,500 Roman Catholic souls per Church parish. It is an intensely Roman Catholic area, with a tremendous amount of close Church ties and family relationships. Father Melancon was well known throughout the Diocese, having served as a Pastor in the Towns of Thibodaux and Cut Off in

Lafourche Parish and at Annunziata in Town of Houma in Terrebonne Parish.

The events surrounding the indictment and trial of Father Robert Melancon came a few years after the arrest, trial and conviction of Father Gilbert Gauthe in the neighboring Roman Catholic Diocese of Lafayette (Louisiana), which proved to be the tip of the iceberg of the priest sex abuse scandal in the United States. In the early 1990s, at the very time Father Melancon was being accused by another young man named R.F. of molestation at St. Genevieve Church in Thibodaux and by K.P. in Houma, the priest sex abuse scandal hit the entire nation stemming from multiple cases in Boston. The names of Father John Geoghan, Father Joseph Birmingham, Father Paul Shanley, Father Ronal Paquin and Father James Porter appeared daily in the *Boston Globe* and other newspapers around the country, including those in South Louisiana.

Even more devastating to the Church was the role of the Bishops of many dioceses who chose to transfer priests accused of abusing children to other Church parishes instead of suspending them from the priestly ministry. Cardinal Bernard Law, the then-Cardinal Archbishop of Boston, became the focal point of outrage against many Bishops, as more and more allegations surfaced throughout the country. Cardinal Law eventually was forced to retire from the Office of Cardinal Archbishop of Boston and was reassigned by the Vatican to a Church position in Rome as a result of his handling of the allegations in the Archdiocese of Boston.

The anger over the handling of the matters of sex abuse by priests has caused a large number of Roman Catholics to leave the faith and sparked the founding of several organizations whose sole purpose is be a watch dog over Bishops who become aware of abuse in their Diocese and either transfer the abusing priests to other Church parishes or ministries or try to hide the facts from the public. Most notable in this regard are Survivors' Network for those Abused by Priests ("SNAP"), Voice of the Faithful ("VOF") and Bishopaccountability.org, to mention a few.

On June 15, 2002, a Dallas newspaper reported that two reporters had made a study of the Bishops of the 178 dioceses in the United States concerning sex abuse by priests and summarized their findings as follows: "roughly two-thirds of top U.S. Catholic leaders (Bishops) have protected priests accused of sexual abuse in a systematic practice that spans decades and continues today, a three month *Dallas Morning News* review shows".

The Melancon case soon became the focal point of the abuse scandal in South Louisiana. From the moment of his indictment and arrest in September 1995 until his trial which began on June 12, 1996, the New Orleans *Times Picayune* and the *Houma Courier* became the *Boston Globe* of South Louisiana. The Court set a bond for Father Melancon at $1,000,000. The fact that the bond was posted by an anonymous donor heightened publicity, as the judge and public sought to identify the donor, apparently suspecting some Church source. The identity of the donor, however, was never disclosed. As Father Melancon's criminal trial date neared, New Orleans and Houma television stations sent live crews to Houma for on-the-scene reports from the Courthouse. Some television and newspaper pictures even showed Father Melancon in irons in an orange prison suit. Even the prosecutor who tried the case for the State stated that he could not go to the grocery without someone coming up to him and asking about the Melancon case.

At the same time that the community was being bombarded with constant updates of the Melancon case, the Diocese of Houma-Thibodaux was in negotiations to settle a civil suit that had been filed by K.P. against Father Melancon, Bishop Jarrell and the Diocese, as his employer, based on nearly identical allegations to the criminal charges. In an obvious move to minimize his and the Diocese's exposure, Bishop Jarrell agreed to settle the civil lawsuit for the extraordinary sum of $800,000 just four days prior to the beginning of Father Melancon's criminal trial. Such a extraordinary settlement just four days before Father Melancon's criminal trial by the Bishop and the Diocese cannot be interpreted as anything but a clear indication that the Diocese had concluded that Father Melancon was guilty of the alleged actions and a demonstration of the realization by the Diocese that, if it waited until after Father Melancon was found guilty by the jury in his criminal trial, the price tag for settlement by Bishop Jarrell and the Diocese would be much higher.

Needless to say, the settlement just four days before Father Melancon's criminal trial by the Bishop and the Diocese was displayed in front page headlines in the local newspaper, the *Houma Courier*, and widely noted in other news media. The settlement just four days before the beginning of Father Melancon's criminal trial of the civil lawsuit by Bishop Jarrell and the Diocese distinguishes this case from other criminal trials with a great deal of news coverage by the press, radio and television.

Just as in Boston where the sexual conduct of the priests became intimately intertwined with Cardinal Law's policy of transferring priests accused of sexual abuse to another Church parish, the civil lawsuit against Father Melancon, Bishop Jarrell and the Diocese became not only a means to get to the "deep pockets" of the Church, but also a way of putting Bishop Jarrell and the Diocese on trial with Father Melancon. In 2002, public pressure from within and without the Church took its toll on Cardinal Law who was forced to resign as the Cardinal Archbishop of Boston and was called to Rome by the Holy Father to assume a position at the Vatican that perhaps saved him from further legal consequences in Massachusetts. Comparably, the settlement of the Melancon civil lawsuit was in a sense a plea by Bishop Jarrell of his guilt and a public statement of his belief that Father Melancon was guilty.

The right of a defendant to have a trial before an impartial jury is guaranteed by the Sixth

Amendment of our Constitution and extended to the States by way of the Fourteenth Amendment. *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed. 2d 420 (1966).

This fundamental tenet of the judicial system has been stated over and over again at all levels of the local, state and Federal systems. In *Irvin, supra*, this Honorable Court stated very clearly,

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standard of due process.

In the instant matter, Father Melancon was deprived of a fair trial. The trial was conducted in a "circus-type atmosphere" in a small community that already had been saturated with intense, highly inflammatory and prejudicial publicity which was directed toward Roman Catholic priests, Bishops of Dioceses and the Roman Catholic Church in general, and Father Melancon in particular. The majority of the jury venire was intimately familiar with the particular facts of the case from the highly inflammatory and prejudicial pretrial media accounts that permeated the community. In addition, the majority of the jury venire already had formed an unwavering opinion as to Father Melancon's guilt, making it impossible to impanel an objective and impartial jury. Father Melancon was Constitutionally entitled to a change of venue, as he clearly demonstrated both actual and presumed prejudice that made it impossible for him to receive a fair trial, when community knowledge about the allegations was influenced in large part by extensive, highly inflammatory and prejudicial media coverage of the Melancon case, including the settlement by Bishop Jarrell and the Diocese just four days prior the commencement to his criminal trial of a lawsuit involving nearly identical allegations to those which formed the basis for the criminal charges against Father Melancon.

Father Melancon is entitled to a writ of habeas corpus, because the denial by the State court of Melancon's motion for a change of venue was a decision that was contrary to clearly established Federal law, as determined by this Honorable Court. The State court reached a different conclusion in Father Melancon's case than that reached by this Honorable Court in *Rideau, supra,* based upon materially indistinguishable facts. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Father Melancon is further entitled to relief, because the factual determination of the State court on the issue of jury impartiality was unreasonable, based upon the evidence presented to the State court. 28 U.S.C. § 2254(d)(2), (e)(1) .

The highly inflammatory and prejudicial publicity of a civil settlement just four days prior to commencement of Father Melancon's criminal trial by his "boss", Bishop Jarrell, and his employer, the Diocese, of nearly identical claims to those which formed the basis for the criminal charges against

Father Melancon clearly permeated the community to the extent that it rendered virtually impossible a fair trial by an impartial jury drawn from that community. Members of the jury venire were repeatedly exposed to broadcasts and print news stories about the allegations against Father Melancon and the settlement by the Diocese, and the salacious nature of the coverage in this matter indisputably served to influence the jury venire against Father Melancon.

In *Rideau*, this Honorable Court reversed the conviction of a habeas petitioner whose confession had been filmed, recorded, and broadcast by the local television station to large audiences in the Louisiana civil parish from which the jury was drawn. Father Melancon's facts are analogous to those of the petitioner in *Rideau*. Through the settlement just four days prior to the commencement of Father Melancon's criminal trial of the civil claims which formed the basis for the criminal charges against Father Melancon, Bishop Jarrell and the Diocese essentially "confessed" that Father Melancon had engaged in the alleged improper conduct, and comparable to the facts in *Rideau*, the "confession" by Bishop Jarrell and the Diocese added to the "carnival atmosphere" that pervaded the entire process and denied Father Melancon a trial with the solemnity and sobriety to which he was duly and justly entitled under any notion of fairness.

While Father Melancon presented substantial evidence of jury pool bias, the principal distilled from the *Rideau* case suggests that "where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, '[jury] prejudice is presumed and there is no further duty to establish bias'" in the jury box. *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980). See also, *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979); *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975); *United States v. Haldeman*, 559 F.2d 31, 60-61 (D.C. Cir. 1976); *Pamplin v. Mason*, 364 F.2d 1, 4-5 (5th Cir. 1966).

The recent decision of this Honorable Court in *Skilling v. United States*, 561 U.S. ____ (2010), supports the reversal of the Court of Appeals in the instant matter. In *Skilling*, this Honorable Court affirmed the Fifth Circuit's ruling that the defendant had received a fair trial despite extensive pretrial publicity. In rendering its decision in *Skilling*, this Honorable Court analyzed the impact of extensive pretrial publicity on the defendant's ability to receive a fair trial, given the size and characteristics of the community from which the jury venire was drawn, the content of the news stories, the level of media coverage at the time of the trial and the jury's decision to acquit the defendant on some charges and convict on others.

First, in applying *Rideau* to the facts in *Skilling*, this Honorable Court contrasted the large size and the diverse and cosmopolitan character of Houston, as the Nation's fourth most populous city, to the setting in *Rideau*, Calcasieu Parish

(Louisiana), with its small town character and population of only approximately 150,000 residents. The contrast between the size and character of the communities in *Skilling* and the instant matter is even more striking. In the instant matter, the crimes allegedly were committed, and the trial was conducted, in an even more closely-knit and smaller community of approximately 100,000 residents, where almost half of the residents were Roman Catholic and the alleged crime involved the highly emotion-provoking topic of priest sex abuse by an individual who had held the trust of the community and where the inflammatory and highly prejudicial publicity created a crisis of faith.

Next, this Honorable Court considered the content of the news stories in both *Skilling* and *Rideau*. In *Skilling*, this Honorable Court observed that the media coverage generally had been objective and unemotional, and the facts of the case were neither heinous nor sensational. In contrast, the news media broadcasts and reports in *Rideau* included a confession by the accused and other blatantly prejudicial information of the type which readers or viewers could not reasonably be expected to shut from sight and which likely imprinted indelibly in the mind of viewers. In the instant matter, from the moment of Father Melancon's indictment and arrest until his trial, the community was bombarded with constant news broadcasts and reports which invited prejudgment of Father Melancon's culpability, including articles about the anonymous person who posted a $1,000,000 cash bond for Father Malancon, Bishop Jarrell being threatened with contempt of court, and another priest of the Diocese being indicted and pleading guilty to seven counts of perjury for lying before the Melancon Grand Jury about his possession of pornographic materials in his rectory. The pretrial media coverage even included specific evidence that was to be introduced at trial, such as lurid notes from Father Melancon to one of the alleged victim. The news media clearly created precisely the kind of "carnival atmosphere" that this Honorable Court found to have pervaded the trial in *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In the instant matter, the conviction of Father Melancon certainly was obtained in a trial atmosphere that "[was] utterly corrupted by press coverage" and that "entirely lack[ed] . . . the solemnity and sobriety to which a defendant is entitled in a system that subscribed to any notion of fairness". *Murphy v. Florida*, 421 U.S. 794 (1975).

Third, this Honorable Court observed in *Skilling* that more than four years elapsed between Enron's bankruptcy and the defendant's trial, and that the decibel level of media attention diminished somewhat in the years following Enron's collapse, while in *Rideau*, the defendant's trial swiftly followed a widely reported crime. In the instant matter, Father Melancon was indicted and arrested in September 1995, and his trial commenced within nine months. Unlike in *Skilling* where the media attention diminished somewhat over time, the intensity of the highly inflammatory and prejudicial pretrial publicity surrounding Father Melancon's case increased dramatically as his trial approached.

The media attention then peaked with the coverage of the settlement for $800,000 by Bishop Jarrell and the Diocese of the civil lawsuit premised upon nearly identical allegations to those which formed the basis for the criminal charges against Father Melancon.

Fourth, while the jury acquitted on some charges and convicted on others in *Skilling*, there were no acquittals either in *Rideau* or for Father Melancon.

Finally, this Honorable Court takes note of the decision by a co-defendant to plead guilty in *Skilling*. What makes the confession by the co-defendant in *Skilling* markedly different from the "confession" by Bishop Jarrell and the Diocese just four days prior to the commencement of Father Melancon's criminal trial was the painstaking care taken by trial court in *Skilling* to delay the proceedings by two weeks, lessening the immediacy of that development, and to include specific questions during *voir dire* concerning the exposure of the prospective jurors to recent publicity concerning the guilty plea. Conversely in Father Melancon's case, the trial was not delayed to lessen the immediacy of the settlement by Bishop Jarrell and the Diocese just four days prior to the commencement of Father Melancon's criminal trial of the civil lawsuit by K.P. based on nearly identical allegations to those which formed the substance of the criminal charges against Father Melancon and no other safeguards of a substantive nature were put in place to ensure a Constitutionally-guaranteed fair trial for Father Melancon.

Father Melancon has clearly demonstrated that, like in *Rideau*, the highly inflammatory and prejudicial pretrial publicity so pervaded and saturated Terrebonne Parish so as to render virtually impossible a fair trial by an impartial jury drawn from the small community and that prejudice is to be presumed. Accordingly, Father Melancon is entitled to the habeas relief that he sought in the lower courts, and the Court of Appeals must, indeed, be reversed and the relief sought by Father Melancon granted.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant the writ of certiorari, vacate the judgment of the United States Court of Appeals for the Fifth Circuit, and either set this case for review or summarily reverse the opinion of the lower court.

Respectfully submitted,

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APPENDIX

Table Of Contents

Melancon v. Ward, 2010 WL 1287833 (C.A.5 (La.)) A-1

Melancon v. Ward, 2008 WL 2559286 (E.D.La.).... A-3

Melancon v. Ward, 2008 WL 782804 (E.D.La.).... A-15

Melancon v. Ward, 2008 WL 2811154 (E.D.La.).. A-17

State v. Melancon, 959 So.2d 502 (La. 6/22/07) ... A-60

State v. Melancon, 673 So.2d 613 (La. 5/17/96) ... A-61

State v. Melancon, 665 So.2d 1173 (La. 1/4/96) ... A-62

State v. Melancon, 660 So.2d 484 (La. 9/22/95) ... A-63

State v. Melancon, 660 So.2d 465 (La. 9/22/95) ... A-64

State v. Melancon, 98-1146 (La.App.1 Cir. 5/14/99)........ A-65

State v. Melancon, Case No. 264,226, 32nd Judicial District Court, Parish of Terrebonne, State of Louisiana (Reasons for Denial of Motion for Post Conviction Relief) A-99

Slip Copy, 2010 WL 1287833 (C.A.5 (La.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 2010 WL 1287833 (C.A.5 (La.)))

United States Court of Appeals,
Fifth Circuit.
Robert MELANCON, Petitioner-Appellant
v.
Kelly WARD, Warden, Respondent-Appellee.
No. 08-30950.
Summary Calendar.

April 5, 2010.

Laurie Anne White, Section A Orleans Criminal District Court, Autumn Alycia Town, Law Office of Autumn Town, New Orleans, LA, for Petitioner-Appellant.

Mary Ellen Hunley, Office of the Attorney General for the State of Louisiana, Baton Rouge, LA, for Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana, USDC No. 2:07-CV-5877.

Before HIGGINBOTHAM, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:[1]

*1 In August 1996, **Robert Melancon**, Louisiana prisoner # 371029, was convicted by jury verdict of aggravated rape of a male under the age of twelve and was sentenced to life imprisonment. He now appeals from the district court's denial of his 28 U.S.C. § 2254 application.

Melancon argues that he did not receive a fair trial because adverse pretrial publicity saturated the community from which the jury was drawn, thereby raising the presumption that he suffered prejudice from jury bias. To the extent that he argues that he also did not receive a fair trial due to prosecutorial animus, that argument is not cognizable because it was not encompassed by the district court's grant of a certificate of appealability. *See Richardson v. Quarterman*, 537 F.3d 466, 472 n. 2 (5th Cir.2008).

Melancon has failed to show that the state appellate court's resolution of this issue warrants relief under 28 U.S.C. § 2254(d). *See Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir.2004). Accordingly, the judgment of the district court is AFFIRMED.

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[1] Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

United States District Court,
E.D. Louisiana.
Robert MELANCON
v.
Kelly WARD, Warden.
Civil Action No. 07-5877.

June 24, 2008.

Laurie Anne White, Criminal District Court, Autumn Alycia Town, Law Office of Autumn Town, New Orleans, LA, for Robert Melancon.

Mary Ellen Hunley, Louisiana Department of Justice, Attorney General's Office, Baton Rouge, LA, for Kelly Ward, Warden.

ORDER AND REASONS

IVAN L.R. LEMELLE, District Judge.

***1** For the following reasons **IT IS ORDERED** that petitioner's § 2254 claims are **DISMISSED.** The instant objections to the magistrate judge's report and recommendations are ripe for review without need of an evidentiary hearing.

BACKGROUND

Melancon was found guilty, at trial in Terrebonne Parish's 32nd Judicial District Court, of aggravated rape of a male under the age of 12 years old. Melancon appealed to the Louisiana First Circuit Court of Appeal. Appellate counsel argued, amongst other things, that,

> the trial court erred in denying the motion to change venue ... the trial court erred in denying three motions for mistrial based upon the introduction of 'other crimes' evidence ... [and that] prosecutorial misconduct deprived [Melancon] of a fair trial. [1]

The Louisiana First Circuit affirmed the conviction and the Louisiana Supreme Court denied the writ application.

Melancon filed an application for post-conviction relief on December 7, 2000, which was denied on May 1, 2006. The Louisiana First Circuit and Louisiana Supreme Court subsequently denied the writ application without reasons. Accordingly, Melancon filed a federal writ of habeas corpus on September 24, 2007.

The Magistrate Judge adopted the following facts from the Louisiana First Circuit Court of Appeal. In

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[1] Report and Recommendation, pg. 5-6.

1985, Melancon became the pastor at Annunziata Church in Terrebonne Parish and persuaded the mother of K.P., an overweight and shy youth, to become an alter server. K.P. testified that Melancon began the long-term sexual abuse by inviting him to his bedroom in the church rectory and inappropriately touching him outside of his clothing. K.P. was about nine and one-half years old when Melancon began having sexual intercourse with him. This conduct continued until the priest was transferred to a different church. During the course of abuse, K.P. had reoccurring rectal bleeding stemming from a rectal tear which his pediatrician assumed was caused by constipation.

In addition to K.P.'s testimony, R.F. claimed to be a victim of Melancon's sexual abuse. Melancon had persuaded R.F.'s mother to allow R.F. to be an alter server. R.F. was shy and overweight at the time that the abuse commenced. The pattern of abuse was similar to that against K.P. in that it began with inappropriate touching and later led to intercourse. Both R.F. and K.P. previously settled civil claims with the Catholic Church; R.F. for $30,000 and K.P. for $800,000.

LAW AND ANALYSIS

1. *Timeliness:*

The first thing to address is whether the petition was filed in time. The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110

Stat. 1214, which has revised habeas corpus legislation, requires that the petition for a writ of habeas corpus be brought within a year after the conviction is final. Petitioner's conviction became final on March 9, 2000. He then waited 272 days to file a petition for post-conviction relief. The statute of limitations "tolled" during the time that such review was pending. 28 U.S.C. § 2244(d)(2); *see also Flanagan v. Johnson*, 154 F.3d 196, 199, n. 1 (5th Cir.1998). Petitioner's time began to "run" again on June 22, 2007 (when the Louisiana Supreme Court denied the application), at which time he had 93 days remaining, or until Sunday, September 23, 2007. The petition was filed on Monday, September 24, 2007, the day after the due date. Nevertheless, this was a timely filing because Sundays are not counted as the last day of the statute of limitations. Fed.R.Civ.P. 6(a)(3).

2. *Burden of Proof:*

*2 Amended 28 U.S.C. § 2254(d)(1) provides the standard for questions of law and questions of mixed law and fact in federal habeas corpus proceedings. Under which, the decision of the state court will be given deference unless the decision "'was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent.]'" *Perry v. Johnson*, 215 F.3d 504, 507 (5th Cir.2000) (quoting *Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000)), *aff'd in part, rev'd in part on other grounds*, 532 U.S. 782 (2001); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir.2000). This standard is clarified in *Williams v. Taylor*, which reads:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.
>
> 529 U.S. 362, 405-06, 412-13 (2000).

A. *Effectiveness of Counsel:*

The question of counsel's effectiveness is a mixed question of law and fact. *Motley v. Collins,* 18 F.3d 1223, 1226 (5th Cir.1994). Thus deference will be granted to the state court judgment unless that decision was contrary to, or an unreasonable application of Supreme Court precedent. *Perry,* 215 F.3d at 507. The appropriate standard is set forth in *Strickland v. Washington,* where petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and that there is a reasonable probability that the outcome would have been different in the absence of those errors. 466 U.S. 668, 687-88, 694 (1984). The court may dispose of a claim if it fails to meet either prong of the *Strickland* standard. *United States v. Kimler,* 167 F.3d 889, 893 (5th Cir.1999). "A court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all to easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Bell v. Cone,* 535 U.S. 685, 697 (2002) (citing *Strickland,* 466 U.S. at 689). The failure of an attorney's strategy is not sufficient grounds for proving deficient performance. *Martinez v. Dretke,* 99 Fed.App. 538, 543 (5th Cir.2004).

In regard to the effectiveness of trial counsel, the contention is unfounded that the post-gag-order comments had an adverse affect on petitioner. Melancon points to the filing of a bar complaint and a rule of contempt against Simno as evidence that the trial judge had an unfavorable opinion toward Simno. Petitioner implies that this led to the denial of both the *Prieur* and change of venue motions.[2] Also, because defense counsel was forced to defend his own actions, he was unable to provide sufficient counsel for Melancon. Further, petitioner alleges that Simno's own childhood molestation by a priest led to his inadequate defense.

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[2] While treatment of the change of venue motion might have led us to a different ruling on that motion-considering together the pre-trial publicity, the parties, and nature of charged offense-deference is afforded to the state courts unless a constitutional violation is shown.

*3 Nevertheless, there is no evidence from the record supporting these contentions. In fact, Melancon's attorneys took action to avoid bias, such as moving to recuse the trial judge and to change venue. The trial judge stated, at the recusal hearing, that the comments by Simno would not have an impact on his ability to properly judge the case.[3] A neutral judge agreed with that statement.[4] Further, the attorneys' diligent efforts to eradicate trial court bias runs contrary to Melancon's assertion that Simno failed to provide adequate defense because of his own childhood molestation. Lastly, Simno's conduct did not deprive Melancon of adequate counsel because a written apology easily resolved the dispute and Melanon had more than one attorney.

Furthermore, petitioner does not demonstrate that it was deficient lawyering, with a harmful effect, when counsel failed to object to evidence of monetary settlements and decided to elicit information regarding petitioner and R.F.'s "post-17" relationship. Petitioner points to the post conviction relief hearing where his other lawyer, John Diguillio, was unable to articulate why he did not object to evidence of the $30,000 settlement between R.F. and the church.[5] Furthermore, Diguillio admitted that he failed to clarify that the church, not petitioner, had entered settlements with the victims.[6] And neither counselor provided a reason why they elicited testimony regarding the sexual relationship with R.F. after he turned 17.

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[3] St. Rec. Vol. 5 of 13, Transcript of Motion to Recuse (continued), 4/30/96.

[4] St. Rec. Vol. 13 of 13, Reasons for Denial of Motion for Post-Conviction Relief, p. 2, 7/27/06.

Nevertheless, these actions by trial counsel can be considered strategy. It was necessary from a defense-perspective to attack the credibility of the witness. This was achieved by demonstrating that R.F. had a financial stake in the case. Further, evidence that R.F. and Melancon continued an intimate relationship after R.F. turned 17 years-of-age can help undermine the claim that an abusive relationship previously occurred between the two. Also, R.F. specifically stated in his testimony that the settlement was with the church, not Melancon.[7] The fact that this trial strategy was not successful is not sufficient grounds for proving deficient performance. *Martinez,* 99 Fed.App. at 543. As such, petitioner fails to meet the *Strickland* standard that representation was objectively unreasonable and that there is a reasonable probability that the outcome would have been different but for the attorney's actions. 466 U.S. at 687-88, 694.

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[5] Transcript of Evidentiary Hearing, October 20, 2004, the Honorable John R. Walker presiding, Case No. 264,226 "B", pg. 53. (Hereinafter 10/20/04 Transcript).

[6] 10/20/04 Transcript, pg. 28.

[7] R. pg. 1289.

In regard to the effectiveness of appellate counsel, petitioner falsely claims that it was error not to directly appeal the trial court's *Prieur* decision. The record indicates that such an appeal would have been unsuccessful because it had already been brought before the Louisiana First Circuit by trial counsel and rejected. Accordingly, petitioner did not suffer prejudice because of the failure to directly appeal the issue. Furthermore, on appeal, counsel argued that the trial court erred in refusing to grant the trial counsel's motions for mistrial that were based upon "other crimes" testimony.[8] The appellate counsel felt that this was sufficient to bring the *Prieur* issue indirectly before the court.[9] Nevertheless, the Louisiana First Circuit found that the trial court properly admitted the evidence. Accordingly, Melancon made no showing that failure to directly appeal the *Prieur* decision was a harmful error.

*4 Further, the petitioner falsely alleges that he was harmed by appellate counsel's failure to challenge the sufficiency of evidence. According to *State v. Maise,* the victim's testimony alone is sufficient to prove penetration. 805 So.2d 1141, 1151 (La.2002); *see also State v. Mitchell,* 453 So.2d 1260 (La.App. 3d Cir.1984). Nevertheless, petitioner contends that such testimony is unreliable because of inconsistencies in K.P.'s story and his statement that his "memory is not that good. [It] runs together a lot."[10] Regardless, the trial court, on post conviction review, found that there was enough evidence to satisfy the *Jackson v. Virginia* standard. 443 U.S. 307, 319 (1979). The *Jackson* standard requires a finding that a review of the evidence, viewed in a manner most favorable to the prosecution, would satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. *Id.* The testimony of K.P., even if blurred, is corroborated by R.F.'s testimony and medical evidence. Accordingly, the evidence is sufficient for a rational trier of fact to find guilt beyond a reasonable doubt. *See id.* Accordingly, petitioner fails to satisfy the *Strickland* test because appellate counsel's strategy was not deficient and did not harm petitioner. *See* 466 U.S. at 687-88, 694.

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[8] St. Rec. Vol. 11 of 13, Transcript of Post-Conviction Hearing, p. 17, 8/18/04. (assignment of error No. 4).

[9] *Id.,* at p. 72-73, 80.

B. *Denial of Due Process:*

Petitioner falsely alleges that he was deprived of a fair trial because of the prosecutor's politically-charged animus toward him and the Catholic church, the high level of negative media attention which led prospective jurors to form an opinion before trial, that nearly a third of potential jurors interviewed had been directly or indirectly the victim of sexual abuse, and the trial judge's decision not to sequester the jury. In order to demonstrate a denial of due process based upon an unfair trial, petitioner must demonstrate "a failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. People of the State of California,* 314 U.S. 219, 236 (1941). A "fair trial in a fair tribunal is a basic requirement of due process" regardless "of the heinousness of the crime charged." *Irvin,* 366 U.S. at 722. Furthermore, in determining prosecutorial misconduct, the "[c]ourt must apply plain error analysis to determine whether the prosecutor's argument seriously affected the fairness, integrity, or public reputation of judicial proceeding and resulted in a miscarriage of justice. *United States v. Goff,* 847 F.2d 149, 162 (5th Cir.1988), *cert. denied,* 488 U.S. 932 (1988) (citing *United States v. Livingston,* 816 F.2d 184, 195 (5th Cir.1987). Furthermore, in order to warrant a new trial, a "defendant, complaining of refusal to sequester, must demonstrate a substantial likelihood of prejudice flowing from the refusal to sequester." *United States v. Greer,* 806 F.2d 556, 557-58 (5th Cir.1986) (citing *United States v. Phillips,* 664 F.2d 971, 997 (5th Cir.1981).

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[10] Appellate R. pg. 871-72.

***5** The petitioner fails to provide evidence from the record demonstrating that he was denied due process. In regard to prosecutorial misconduct, all petitioner can point to is the D.A.'s thorough investigation of the Catholic church, which included demanding the identity of the anonymous donor who posted petitioner's bail, and a statement, made at a pre-trial hearing, that the defense was attempting "to wrap the cloak of Catholicism around prospective jurors."[11] Nevertheless, this evidence does not demonstrate a lack of fairness necessary to result in a "miscarriage of justice." *See Goff,* 847 F.2d at 162. Rather, the trial court found, on post conviction review, that all references to the Catholic church were made for legitimate purposes.

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[11] Appellate R. pg. 614.

Additionally, the argument that the jury was biased is supported only by evidence pertaining to prospective jurors, not those who actually served. Petitioner points to previously sealed voir dire transcripts, which indicated that a large portion of potential jurors had already formed an opinion, in fact, the first box was entirely dismissed.[12] Furthermore, the polling data showing bias, pertained to prospective jurors. Nonetheless, this is the very purpose of voir dire, to remove potential jurors who are biased. Accordingly, the petitioner only provides evidence that potential jurors had already formed an opinion, not those who actually served. Further, because there is no evidence that the actual jury was biased, there is no evidence that the decision not to sequester resulted in a substantial likelihood of prejudice *See Greer,* 806 F.2d at 557-58. As such, petitioner was not deprived of Due Process.

CONCLUSION

Based on the foregoing analysis, this Court holds that Petitioner **Robert Melancon's** § 2254 claims are **DENIED.**

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[12] 8/18/04 Transcript, pg. 42.

Not Reported in F.Supp.2d, 2008 WL 782804 (E.D.La.)
(Cite as: 2008 WL 782804 (E.D.La.))

United States District Court,
E.D. Louisiana.
Robert MELANCON
v.
Kelly WARD, Warden.
Civil Action No. 07-5877.

March 19, 2008.

Laurie Anne White, Autumn Alycia Town, Laurie A. White & Associates, LLC, New Orleans, LA, for Robert Melancon.

Mary Ellen Hunley, Louisiana Department of Justice, Attorney General's Office, Baton Rouge, LA, for Kelly Ward.

ORDER

IVAN L.R. LEMELLE, District Judge.

***1** The Court, having considered the complaint, the record, the applicable law, the Report and Recommendation of the United States Magistrate Judge, and the failure of any party to file an objection to the Magistrate Judge's Report and Recommendation, hereby approves the Report and

Recommendation of the United States Magistrate Judge and adopts it as its opinion in this matter. Therefore,

IT IS ORDERED that the petition of **Robert Melancon** for issuance of a writ of habeas corpus under 28 U.S.C. § 2254 be **DENIED** and the petition **DISMISSED WITH PREJUDICE.**

Not Reported in F.Supp.2d, 2008 WL 2811154
(E.D.La.)
(Cite as: 2008 WL 2811154 (E.D.La.))

United States District Court,
E.D. Louisiana.
Robert MELANCON
v.
Kelly WARD, Warden
No. Civ.A. 07-5877.

March 6, 2008.

Laurie Anne White, Criminal District Court-Orleans Parish, Autumn Alycia Town, Law Office of Autumn Town, New Orleans, LA, for Robert Melancon.

Mary Ellen Hunley, Louisiana Department of Justice Attorney General's Office, Baton Rouge, LA, for Kelly Ward Warden.

REPORT AND RECOMMENDATION

WILKINSON, Magistrate J.

*1 This matter was referred to the undersigned United States Magistrate Judge to conduct hearings, including an evidentiary hearing if necessary, and to submit proposed findings and recommendations for disposition pursuant to 28 U.S.C. §§ 636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules

Governing Section 2254 Cases. Upon review of the entire record, I have determined that a federal evidentiary hearing is unnecessary. *See* 28 U.S.C. § 2254(e)(2).[1] For the following reasons, I recommend that the instant petition for habeas corpus relief be DENIED and the petition DISMISSED WITH PREJUDICE.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

The petitioner, **Robert Melancon**, is incarcerated in the David Wade Correctional Center, in Homer, Louisiana.[2] On September 14, 1995, Melancon was indicted in Terrebonne Parish for the aggravated rape of a male under the age of 12 years old.[3] The Louisiana First Circuit Court of Appeal summarized the facts of the case as follows:

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[1] Under 28 U.S.C. § 2254(e)(2), whether to hold an evidentiary hearing is a statutorily mandated determination. Section 2254(e)(2) authorizes the district court to hold an evidentiary hearing only when the petitioner has shown either that the claim relies on a new, retroactive rule of constitutional law that was previously unavailable, 28 U.S.C. § 2254(e)(2)(A)(i), or the claim relies on a factual basis that could not have been previously discovered by exercise of due diligence, 28 U.S.C. § 2254(e)(2)(A)(ii); and the facts underlying the claim show by clear and convincing evidence that, but for the constitutional error, no reasonable jury would have convicted the petitioner. 28 U.S.C. § 2254(e)(2)(B).

[2] Rec. Doc. No. 1.

[3] St. Rec. Vol. 1 of 13, Indictment, 9/14/95. Melancon was also charged in Terrebonne Parish Criminal Case No. 269196 with four counts of lewd and lascivious acts upon two other males under the age of 17. St. Rec. Vol. 9 of 13, Amended Bill of Indictment, No. 269196, 1/2/96.

> In 1985, the defendant became the pastor at Annunziata Church, a Catholic Parish in Terrebonne Parish. A few months later, the defendant talked with a parishioner about her younger son, K.P., becoming an altar server for the church. The family's older son was already serving as an altar boy when the defendant arrived at the church. K.P., overweight for his age, was shy and did not have a lot of friends. When K.P. began serving as an altar boy, his service included Mass on Sundays, weddings, baptisms, and funerals. After most of the services, the defendant would bring K.P. home. During the years that K.P. served as an altar boy, the defendant would occasionally take him out to eat and buy him gifts, such as cassette tapes and clothes.
>
> K.P. testified that his abuse began casually, by the defendant inviting him upstairs to his bedroom in the church rectory. He watched television with the defendant in the priest's bedroom with the door closed. At first, no touching occurred. Then, the defendant began rubbing K.P.'s stomach. He progressed to kissing K.P.'s face and chest and fondling his genitalia. At first, the defendant touched K.P. on the outside of

his clothing.

The first acts occurred in the summer, about one year after K.P. met the priest. K.P. was about nine and one-half years old when the defendant began having anal intercourse with him. The defendant continued having intercourse with K.P., averaging one or two times per month until the priest was transferred to a different church. The acts usually occurred after 5:00 p.m.

K.P. who was nineteen years old at the time of trial, admitted that he revealed he was homosexual after his eighteenth birthday. He denied that his "coming out" had anything to do with his allegations against the defendant. Rather, K.P. stated that he waited until his eighteenth birthday to reveal his sexual orientation because "high school people are very, very scared of things that are different." K.P. also denied that his allegations were motivated by his civil lawsuit, which was settled shortly before the criminal trial for about $800,000.

***2** On cross-examination, K.P. admitted that the majority of the rapes occurred after he had assisted at weddings or funerals. He did not recall any specific acts occurring on Sundays in connection with his service at baptisms. K.P. further testified that he never served at weddings or funerals during school hours and never left the rectory on his own and walked home. He could clearly recall only two incidents in which he had been raped; one occurred when the defendant and K.P. returned to the rectory from a funeral. K.P. testified that the first act of anal intercourse occurred in the summer of 1986. Although he did not clearly remember all the incidents, he was certain that he had been raped while he was in the sixth grade.

At first, K.P. stated that he never saw anyone in the rectory on the occasions that the rapes occurred; then he admitted that he saw Virginia Chatagnier, the housekeeper, on many occasions in the rectory. At those times he would usually greet the housekeeper. During her testimony, Ms. Chatagnier testified that occasionally, after K.P. and his brother served at morning mass, she would see them with the defendant, who indicated that he was taking the boys to breakfast and then on to their school. For about the year and a half before the defendant was moved from Annunziata Church, she was working in the rectory between 5:00 p.m. and 7:00 p.m. to prepare dinner.

Between the years of 1985 and 1991, K.P. had rectal bleeding. K.P.'s mother took him to the pediatrician, who examined K.P. and found a tear in the rectum. The doctor assumed the tear was caused by constipation and prescribed stool softeners and mineral oil, which would stop the bleeding in a few days. However, according to the mother, every few weeks the bleeding would return. When the defendant left the church parish in 1991, K.P.'s rectal bleeding did not return.

In May of 1992, K.P. told his cousin, Deacon Jeff Heipl, that he had been molested by the defendant. K.P. stated that the acts had stopped, but did not reveal the extent of the abuse. K.P. did not want Deacon Heipl to inform the victim's parents.

In April of 1995, K.P. disclosed to a friend that he had been sexually abused by the defendant in the past. This friend encouraged K.P. to tell the high school guidance counselor. When K.P. revealed the abuse, school officials reported the information to law enforcement authorities. K.P., who was having suicidal thoughts, was then admitted to a psychiatric hospital for about a week. After K.P. returned home, his parents were contacted by an attorney for the Catholic Diocese who wanted to talk to K.P. Following this unsolicited contact, K.P.'s parents filed a civil lawsuit against the defendant and the Catholic Church for the victim's sexual abuse.

R.F. testified that he was eleven years old when he met the defendant, who officiated at a Mass for his deceased father. At the time, the priest encouraged R.F.'s mother to allow her son, on overweight child, to become an altar boy. After R.F. became an altar boy, he was sexually abused by the defendant. The abuse occurred in the rectory and began with massaging and fondling by the priest. R.F. stated he was thirteen years old when the acts led to anal intercourse. During his testimony, R.F. also identified greeting cards sent to him by the defendant which referred to "Willie." R.F. testified that the defendant used this name to refer to R.F.'s penis. R.F. further admitted that he settled a civil lawsuit against the Catholic Church and the defendant for $30,000.

*3 Dr. Scott Benton, the director of the Child Abuse Program at Children's Hospital in New Orleans, testified that the Terrebonne Parish District Attorney's Office requested that he examine K.P. In conjunction with the physical examination in July of 1995, K.P. related that when he was between the ages of eight and fourteen, the defendant sexually molested him. The medical history reported by K.P. indicated that the acts included fondling and anal intercourse. The victim also told the doctor that the priest had posters of semi-nude women in his bedroom. Dr. Benton did not report any abnormal physical findings, but explained that this was not unusual, because the tissue around the anus is designed to stretch and heal without scarring.

The defense counsel denied the acts ever occurred. In an attempt to show that the allegations were false, the defendant presented testimony of witnesses who lived or worked in the rectory. Several witnesses testified that they never saw K.P. in the rectory. These witnesses included Father Leopold Skorogod, who lived in the rectory and was regimented in his daily routine. He always watched television in a room on the first floor of the rectory in the evenings after 5:00 p.m. until about 10:00 p.m. Father Leopold testified that he never saw K.P. in the rectory. While he stated that he had an unobstructed view of the rear door from his chair while watching television in the meeting room, he admitted that his view of the stairway leading to the second floor was partially blocked. However, because of the creaking stairs, he would know if someone was using the stairs.

Harriet Pelligrin, the secretary and bookkeeper who worked on the first floor of the rectory, never recalled seeing K.P. in the rectory. However, she admitted that when she was in the her office, she did not know who came in or out of the rectory. Many of the witnesses asserted that the stairs leading to the second floor creaked and that the walls were not well insulated. However, in order to enter the defendant's bedroom, a person did not have to pass the bedroom of others. Several witnesses, who had access and an opportunity to go into the defendant's room testified that they never saw posters in the priest's bedroom depicting beer advertisements or seminude women.

The defendant also presented the

> testimony of Terry Campbell, who stated that while on a youth trip, K.P. confided in her that he had been touched in an inappropriate manner by Father Morrison, another priest; he did not accuse the defendant of any inappropriate touching. K.P. also told her that during the trip he did not want to be assigned a room with a priest because of the past sexual touching and was reassigned a room with Deacon Heipl.
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> (footnote omitted) *State v. Melancon*, 739 So.2d 1017 (La.App. 1st Cir.1999) (Table); State Record Volume 9 of 13, Louisiana First Circuit Court of Appeal Opinion, 98-KA-1146, pp. 2-6, May 14, 1999.

Melancon was tried before a jury from June 10 through 14, and June 17 and 18, 1996, and he was found guilty as charged.[4] The state trial court sentenced him on August 12, 1996, to serve a mandatory life sentence without benefit of parole, probation or suspension of sentence.[5] Melancon's counsel gave oral notice of intent to appeal but did not file a written notice of appeal until 10 months later, on June 20, 1997.[6]

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[4] St. Rec. Vol. 6 of 13, Verdict Form (2 pages), 6/18/96; St. Rec. Vol. 8 of 13, Trial Minutes, 6/10/96; Trial Minutes, 6/11/96; Trial Minutes, 6/12/96; Trial Minutes, 6/13/96; Trial Minutes, 6/14/96; Trial Minutes, 6/17/96; Trial Minutes, 6/18/96.

[5] St. Rec. Vol. 8 of 13, Sentencing Minutes, 8/12/96; St. Rec. Vol. 6 of 8, Sentencing Transcript, 8/12/96.

*4 On direct appeal, Melancon's counsel raised five grounds for relief:[7] (1) The trial court erred in denying the motion to change venue. (2) The trial court erred in accepting challenges for cause to excuse two jurors from the panel. (3) The trial court erred in admitting the hearsay testimony of a doctor as to statements of the victim. (4) The trial court erred in denying three motions for mistrial based upon the introduction of "other crimes" evidence. (5) Prosecutorial misconduct deprived him of a fair trial.

On May 14, 1999, the Louisiana First Circuit Court of Appeal affirmed the conviction and sentence, finding no merit to any of Melancon's claims.[8] Melancon's counsel filed a writ application with the Louisiana Supreme Court on June 11, 1999, seeking review of the same five claims.[9] The court denied the application without reasons on December 10, 1999.[10]

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[6] St. Rec. Vol. 8 of 13, Sentencing Minutes, 8/12/96; St. Rec. Vol. 6 of 8, Sentencing Transcript, p. 8, 8/12/96; St. Rec. Vol. 8 of 13, Motion and Order Fixing Return Date for Filing Appeal, 6/20/07; Trial Court Order, 6/10/97.

[7] St. Rec. Vol. 9 of 13, 1st Cir. Opinion, 98-KA-1146, 5/14/99.

[8] *State v. Melancon*, 739 So.2d at 1017; St. Rec. Vol. 9 of 13, 1st Cir. Opinion, 98-KA-1146, 5/14/99.

[9] St. Rec. Vol. 9 of 13, La. S.Ct. Letter, 99-K-1708, 6/11/99; Copy of La. S.Ct. Writ Application, (signed by counsel 6/10/99), 6/13/00.

Melancon's conviction became final 90 days later, March 9, 2000, when he did not file a writ application with the United States Supreme Court. *Ott v. Johnson,* 192 F.3d 510, 513 (5th Cir.1999) (period for filing for certiorari with the United States Supreme Court is considered in the finality determination under 28 U.S.C. § 2244(d)(1)(A)), *cert. denied,* 529 U.S. 1099, 120 S.Ct. 1834, 146 L.Ed.2d 777 (2000); U.S. Sup.Ct. Rule 13(1).[11]

On December 7, 2000, Melancon, through other retained counsel, filed an application for post-conviction relief in the state trial court raising the following grounds for relief:[12] (1) Trial and appellate counsel provided ineffective assistance in the following ways: (a) trial counsel erred in making statements to the press after a gag order was issued; (b) trial counsel erred in seeking to include evidence of the monetary settlements to the victim and a witness; (c) trial counsel failed adequately to cross-examine the witness; (d) appellate counsel failed to challenge the trial court's ruling on the *Prieur* motion to admit evidence of the sexual abuse to the witness; (e) appellate counsel failed to challenge the sufficiency of the evidence. (2) He was denied due process and a fair trial because of the prosecutor's animus towards Melancon and the Catholic church and due to adverse publicity surrounding the case.

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[10] *State v. Melancon,* 751 So.2d 243 (La.1999); St. Rec. Vol. 9 of 13, La. S.Ct. Order, 99-K-1708, 12/10/99.

[11] This includes consideration that February of 2000 had 29 calendar days. This apparently accounts for the error in the State's calculation of the 90-day period.

[12] St. Rec. Vol. 10 of 13, Application for Post-Conviction Relief, 12/7/00; Memorandum in Support of Application for Post-Conviction Relief, 12/7/00; Supplemental Memorandum in Support of Application for Post-Conviction Relief, dated 7/7/03; St. Rec. Vol. 9 of 13, Application for Post-Conviction Relief (Corrected), 1/8/03; St. Rec. Vol. 13 of 13, Post-Hearing Memorandum in Support of Application for Post-Conviction Relief, 3/1/05.

After delayed efforts by Melancon's counsel to obtain certain transcripts, the state trial court held two evidentiary hearings on Melancon's application.[13] On May 1, 2006, the state trial court denied the application noting that "written reasons are currently being prepared."[14] The court thereafter issued written reasons finding that, based on the evidentiary hearing testimony and argument, trial counsel acted within the boundaries of sound trial strategy and that appellate counsel raised only those claims on appeal that he felt had merit.[15] The court also resolved that the Louisiana First Circuit had already determined that the evidence was sufficient to support the verdict, that there was no prosecutorial misconduct, and that the adverse publicity did not render the trial unfair.

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[13] St. Rec. Vol. 11 of 13, Transcript of Post-Conviction Hearing, 8/18/04; St. Rec. Vol. 12 of 13, Transcript of Post-Conviction Hearing, 10/20/04.

[14] St. Rec. Vol. 13 of 13, Trial Court Order, 5/1/06.

[15] St. Rec. Vol. 13 of 13, Reasons for Denial of Motion for Post-Conviction Relief, 7/27/06; Notice of Ruling, 8/1/06.

***5** Melancon's counsel filed a timely writ application with the Louisiana First Circuit and the court denied the application without reasons on November 29, 2006.[16] Melancon's counsel also filed a timely writ application in the Louisiana Supreme Court, which was denied without reasons on June 22, 2006.[17]

II. *FEDERAL HABEAS PETITION*

On September 24, 2007, Melancon, through retained counsel, filed a petition for federal habeas corpus relief in this court raising two grounds for relief:[18] (1) Trial and appellate counsel provided ineffective assistance in the following ways: (a) trial counsel erred in making statements to the press after a gag order was issued; (b) trial counsel erred in seeking to include evidence of the monetary settlements to the victim and the witness; (c) trial counsel failed adequately to cross-examine the witness; (d) appellate counsel failed to challenge the trial court's ruling on the *Prieur* motion to admit evidence of the sexual abuse to the witness; (e) appellate counsel failed to challenge the sufficiency of the evidence. (2) He was denied due process and a fair trial because of the prosecutor's animus towards Melancon and the Catholic church and due to adverse publicity surrounding the case.

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[16] The record does not contain a copy of this writ application. The filing date of July 31, 2006, was confirmed through counsel for the State and the clerk of the Louisiana First Circuit Court of Appeal. St. Rec. Vol. 13 of 13, 1st Cir. Order, 2006 KW 1520, 11/29/06.

[17] The record does not contain a copy of this writ application. The filing date was confirmed with the clerk of the Louisiana Supreme Court. St. Rec. Vol. 13 of 13, La. S.Ct. Letter, 2006 KP-3003, 12/22/06; *State v. Melancon,* 959 So.2d 502 (La.2007); St. Rec. Vol. 13 of 13, La. S.Ct. Order, 2006-KP-3003, 6/22/07.

[18] Rec. Doc. No. 1.

The State filed an answer and memorandum in opposition to Melancon's petition conceding exhaustion but arguing that Melancon's petition was not timely filed.[19] Alternatively, the State argued that the claims are without merit and Melancon is not entitled to relief.

III. *GENERAL STANDARDS OF REVIEW*

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214, comprehensively revised federal habeas corpus legislation, including 28 U.S.C. § 2254. The AEDPA went into effect on April 24, 1996[20] and applies to habeas petitions filed after that date. *Flanagan v. Johnson*, 154 F.3d 196, 198 (5th Cir.1998) (citing *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997)). The AEDPA therefore applies to Melancon's petition, which was filed by counsel with this Court on September 24, 2007.

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[19] Rec. Doc. No. 5.

[20] The AEDPA, which was signed into law on that date, does not specify an effective date for its non-capital habeas corpus amendments. Absent legislative intent to the contrary, statutes

The threshold questions in habeas review under the amended statute are whether the petition is timely and whether the claims raised by the petitioner were adjudicated on the merits in state court; *i.e.*, the petitioner must have exhausted state court remedies and must not be in "procedural default" on a claim. *Nobles v. Johnson*, 127 F.3d 409, 419-20 (5th Cir.1997) (citing 28 U.S.C. § 2254(b), (c)).

The State has alleged as its primary defense that Melancon's federal petition is not timely filed. I find that this defense must be rejected. In brief, the AEDPA requires a petitioner to bring his Section 2254 petition within one year of the date his conviction became final.[21] *Duncan v. Walker*, 533

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become effective at the moment they are signed into law. *United States v. Sherrod*, 964 F.2d 1501, 1505 (5th Cir.1992).

[21] The statute of limitations provision of the AEDPA provides for other triggers which do not apply here:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> A. the date on which the judgment became final by the conclusion of direct review or the

U.S. 167, 179-80, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). The AEDPA itself provides for interruption of the one-year limitations period, in stating that,

> "[t]he time during which a *properly filed application for State post-conviction or other collateral review* with respect to the pertinent judgment or claim is pending *shall not be counted* toward any period of limitation under this subsection."

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expiration of the time for seeking such review;

B. the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;

C. the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

D. the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. 28 U.S.C. § 2244(d).

28 U.S.C. § 2244(d)(2) (emphasis added).

***6** In this case, as discussed above, Melancon's conviction became final on March 9, 2000. He allowed 272 days to elapse from that date before his counsel filed an application for post-conviction relief in the state trial court on December 7, 2000. I have determined that this, and Melancon's subsequent state court pleadings, remained pending and continued to toll the AEDPA statute of limitations period through June 22, 2007. This is the date on which his last writ application to the Louisiana Supreme Court was denied. At that time, Melancon had 93 days remaining in the AEDPA statute of limitations period, or until Sunday, September 23, 2007, to file his federal petition. His counsel filed the petition on the following business day, Monday, September 24, 2007. *See* Fed.R.Civ.P. 6 (Sundays excluded as the last day in time computation). His petition is timely and the State's timeliness defense must be rejected.

IV. *STANDARDS OF REVIEW*

Amended 28 U.S.C. §§ 2254(d)(1) and (2) contain revised standards of review for questions of fact, questions of law and mixed questions of fact and law in federal habeas corpus proceedings. *Nobles,* 127 F.3d at 419-20 (citing 28 U.S.C. § 2254(b) and (c)).

Determinations of questions of fact by the state court are "presumed to be correct ... and we will give deference to the state court's decision unless it 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' " *Hill v. Johnson,* 210 F.3d 481, 485 (5th Cir.2000) (quoting 28 U.S.C. § 2254(d)(2)), *cert. denied,* 532 U.S. 1039, 121 S.Ct. 2001, 149 L.Ed.2d 1004 (2001). The amended statute also codifies the "presumption of correctness" that attaches to state court findings of fact and the "clear and convincing evidence" burden placed on a petitioner who attempts to overcome that presumption. 28 U.S.C. § 2254(e)(1).

A state court's determination of questions of law and mixed questions of law and fact are reviewed under 28 U.S.C. § 2254(d)(1) and receive deference, unless the state court's decision " 'was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent.]' " *Penry v. Johnson,* 215 F.3d 504, 507 (5th Cir.2000) (quoting *Miller v. Johnson,* 200 F.3d 274, 280-81 (5th Cir.), *cert. denied,* 531 U.S. 849, 121 S.Ct. 122, 148 L.Ed.2d 77 (2000)), *aff'd in part, rev'd in part on other grounds,* 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001); *Hill,* 210 F.3d at 485. The United States Supreme Court has clarified the Section 2254(d)(1) standard as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this

> Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

*7 *Williams v. Taylor,* 529 U.S. 362, 405-06, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Penry,* 532 U.S. at 792-93; *Hill,* 210 F.3d at 485.

> "'A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state court decision applied [a Supreme Court case] incorrectly.'"
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> *Price v. Vincent,* 538 U.S. 634, 641, 123 S.Ct. 1848, 155 L.Ed.2d 877 (2003) (quoting *Woodford v. Visciotti,* 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002)) (brackets in original); *Bell v. Cone,* 535 U.S. 685, 699, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

Rather, under the "unreasonable application" standard, "the only question for a federal habeas court is whether the state court's determination is objectively unreasonable." *Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir.2002), *cert. denied, sub nom, Neal* *v. Epps,* 537 U.S. 1104, 123 S.Ct. 963, 154 L.Ed.2d 772 (2003). The burden is on the petitioner to show that the state court applied the precedent to the facts of his case in an objectively unreasonable manner. *Price,* 538 U.S. at 641 (quoting *Woodford,* 537 U.S. at 24-25); *Wright v. Quarterman,* 470 F.3d 581, 585 (5th Cir.2006).

V. *INEFFECTIVE ASSISTANCE OF COUNSEL*

Melancon alleges that he received ineffective assistance from both his trial and appellate counsel. He claims that his trial counsel erred in making statements to the press after a gag order was issued, erred in seeking to include evidence of the monetary settlements to the victims, and failed adequately to cross-examine the witness. He further alleges that his appellate counsel failed to challenge the trial court's ruling on the *Prieur* motion to admit evidence of the sexual abuse to the witness and failed to challenge the sufficiency of the evidence on appeal.

These claims were first raised in Melancon's application for post-conviction relief. The last reasoned decision was that of the state trial court.[22] The court resolved that the violation of the gag order was a matter resolved pretrial and had no effect on the defense or on the performance of his counsel during trial. The court also held that, based on the post-conviction testimony, trial counsel made the decision to address the financial settlements and to attack the witness's testimony as part of the strategy of the defense to undermine the credibility of the alleged victims. The court also noted that the admissibility of the "other crimes" evidence had been resolved before trial and the defense was unsuccessful on writ applications seeking to overturn the trial court's ruling in that regard. In sum, the court resolved that defense counsel's actions fell within the ambit of permissible and sound trial strategy.

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[22] St. Rec. Vol. 13 of 13, Reasons for Denial of Motion for Post-Conviction Relief, 7/27/06.

With regard to the claims against appellate counsel, the court resolved, based on appellate counsel's testimony, that he raised only those claims that he felt had merit after review of the record and discussions with trial counsel. Counsel believed that the case hinged on a credibility call and that a challenge to the sufficiency of the evidence would not have been successful under the standards of *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

*8 The Louisiana First Circuit and the Louisiana Supreme Court both denied Melancon's subsequent writ applications without reasons. When the last state court judgment does not indicate whether it is based on procedural default or the merits of a federal claim, it is presumed that the court relied upon the same grounds as the last reasoned state court opinion. *Ylst v. Nunnemaker,* 501 U.S. 797, 802, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991).

The issue of ineffective assistance of counsel is a mixed question of law and fact. *Motley v. Collins,* 18

F.3d 1223, 1226 (5th Cir.1994). Thus, the question before this court is whether the state courts' denial of relief was contrary to, or an unreasonable application of, United States Supreme Court precedent.

The standard for judging the performance of counsel was established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which the state trial court cited and applied. In *Strickland,* the United States Supreme Court established a two-part test for evaluating claims of ineffective assistance of counsel in which the petitioner must prove deficient performance and resulting prejudice. *Strickland,* 466 U.S. at 697. The Supreme Court first held that "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. Second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *United States v. Kimler,* 167 F.3d 889, 893 (5th Cir.1999).

In deciding ineffective assistance of counsel claims, this court need not address both prongs of the conjunctive *Strickland* standard, but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test. *Kimler,* 167 F.3d at 893. A habeas corpus petitioner "need not show that 'counsel's deficient conduct more likely than not altered the outcome in the case.' It is not enough, however, under *Strickland* 'that the errors had some conceivable effect on the outcome of the proceeding.'" *Motley,* 18 F.3d at 1226 (quoting *Strickland,* 466 U.S. at 693).

On federal habeas review, scrutiny of counsel's performance "must be highly deferential," and the court will "indulge a strong presumption that strategic or tactical decisions made after an adequate investigation fall within the wide range of objectively reasonable professional assistance." *Moore v. Johnson,* 194 F.3d 586, 591 (5th Cir.1999) (citing *Strickland,* 466 U.S. at 689-90). In assessing counsel's performance, a federal habeas court must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time of trial. *Strickland,* 466 U.S. at 689; *Neal,* 286 F.3d at 236-37; *Clark v. Johnson,* 227 F.3d 273, 282-83 (5th Cir.2000), *cert. denied,* 531 U.S. 1167, 121 S.Ct. 1129, 148 L.Ed.2d 995 (2001).

> "A court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight."
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> *Bell,* 535 U.S. at 697 (citing *Strickland,* 466 U.S. at 689).

*9 This court must apply the "strong presumption" that counsel's strategy and defense tactics fall "within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 690. Federal courts have consistently recognized that tactical decisions when supported by the circumstances are objectively reasonable and do not amount to unconstitutionally deficient performance. *Lamb v. Johnson,* 179 F.3d 352, 358 (5th Cir.1999), *cert. denied,* 528 U.S. 1013, 120 S.Ct. 522, 145 L.Ed.2d 401 (1999) (citing *Rector v. Johnson,* 120 F.3d 551, 564 (5th Cir.1997) and *Mann v. Scott,* 41 F.3d 968, 983-84 (5th Cir.1994)). Federal habeas courts presume that trial strategy is objectively reasonable unless clearly proven otherwise. *Strickland,* 466 U.S. at 689; *Moore,* 194 F.3d at 591. The burden is on petitioner to demonstrate that counsel's strategy was constitutionally deficient. *Id.*

A. *Trial Counsel's Actions*

Melancon claims that his trial counsel erred in making statements to the press after a gag order was issued, erred in seeking to include evidence of the monetary settlements to the victims, and failed adequately to cross-examine the witness, by introducing his civil settlement and a sexual relationship with Melancon between ages 17 and 24. Melancon relies on the fact that one of his attorneys, George Simno, made comments to the press before trial regarding the trial judge's perceived bias. The record demonstrates that the comments led to a bar complaint against Simno by the trial judge and were resolved with a written apology. Melancon argues that this scenario affected the relationship between the defense and the trial court. Melancon also suggests that Simno's post-conviction testimony that the case was an emotional one and his disclosure that, as a child, he was inappropriately touched by a priest, had an impact on Simno's performance and crucial trial decisions. He argues that the cumulative affect of Simno's pretrial arrogance and confrontational behavior created a negative public sentiment and undermined the defense.

Melancon offers no particular reference in the record which would demonstrate that counsel's remarks negatively impacted the defense or the outcome of the trial. The record shows that whatever negative public sentiment, if any, existed had been aired before Simno's comments and was in fact brought to the court's attention by Simno and co-counsel through the motions to change venue.[23]

In addition, Melancon has failed to demonstrate how Simno's comments in any way affected the trial judge's decisions in a manner to effect the outcome of trial. There is nothing in the record to demonstrate that the trial court retaliated or reacted to Simno's comments by unfavorably ruling on the *Prieur* motion or the motion to change venue. In fact, the trial judge specifically testified at the motion to recuse that Simno's statements and the complaint to the Louisiana State Bar Association Disciplinary Committee would have no effect on him if Simno continued to practice before him.[24] When ruling on this issue post-conviction, the state trial court also specifically held that defense counsel's pretrial actions "did not undermine the process ..."[25] The trial judge was in the best position to determine whether counsel's actions impacted the process and his own rulings. In fact, a neutral judge made the same conclusions at the hearing on the motion to recuse the trial judge.

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[23] St. Rec. Vol. 2 of 13, Motion for Change of Venue, 11/28/95; St. Rec. Vol. 4 of 13, Motion for Change of Venue, 5/1/96; *see also,* St. Rec. Vol. 5 of 13, Motion for Gag Order, 5/14/06.

***10** Melancon has not demonstrated that counsel's pretrial comments to the press after the gag order in any way affected the trial, the trial judge or the ability of the defense to function before the court. If anything, the record reflects that Simno and co-counsel were zealous and effective in presenting Melancon's case to the court and to the jury. Melancon has not shown that Simno was deficient or that his pretrial comments prejudiced the outcome of the case.

Melancon also suggests that counsel erred in failing to exclude, and instead actively presenting, evidence of the monetary settlements paid to the victim and a witness by the Catholic church, not Melancon. John

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[24] St. Rec. Vol. 5 of 13, Transcript of Motion to Recuse (continued), 4/30/96.

[25] St. Rec. Vol. 13 of 13, Reasons for Denial of Motion for Post-Conviction Relief, p.2, 7/27/06.

DiGiulio, trial co-counsel for Melancon, testified at the post-conviction hearing that the defenses against the victim's allegations were that he had a financial interest and was not telling the truth, in light of the $800,000 civil settlement he made with the Diocese of Houma/Thibodaux just prior to trial.[26] He also testified that, because the state courts allowed the witness's testimony to be introduced as evidence of pattern, the strategy regarding the allegations and expected testimony of the witness was that over the age of 17, he had a consensual relationship with Melancon.[27]

As part of that defense, counsel elicited testimony from the witness on cross-examination that the relationship lasted beyond age 17, until age 24, and that he had received a $30,000 settlement in connection with his prior civil suit regarding the underage abuse. DiGiuglio could not recall what the strategic reasons was for presenting this information regarding the witness and Melancon.

George Simno, as co-counsel, testified at the post-conviction hearing that the defense strategy was simply to refute the State's evidence against Melancon.[28] He stated that one of the theories of the defense was that the victim was interested in money and another was that there was no evidence to corroborate anything he said.[29] With regard to the $800,000 settlement made on the eve of the criminal trial, he stated that he did not believe it to be harmful to the defense and in fact thought it relevant to the defense: [30]

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[26] St. Rec. Vol. 11 of 13, Transcript of Post-Conviction Hearing, pp. 22, 27, 8/18/04.

[27] *Id.*, pp. 22, 29.

[28] St. Rec. Vol. 12 of 13, Transcript of Post-Conviction Hearing, p. 21-22, 10/20/04.

> I don't think it would be harmful. I think it gives him 800,000 reasons to lie and disregard the truth having participated in his civil deposition.
>
> Well, obviously, if it came in and the case was settled on the eve of trial, it would have been part of our defense. Whether it was strategy or not, I am not going to quibble with your term. If you want to call it a strategy, that's fine. It was 800,000 reasons to cast a bad light on [the victim] to show that he had a reason to be-disregard the truth.

With regard to the settlement by the witness, Simno also could not recall why this would have been part of the defense theory.[31] He did recall, however, that the defense knew it would be facing the testimony of a witness who had also received a civil settlement.[32] He also stated that the defense believed that the witness, like the victim, had "30,000 reasons to lie."[33]

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[29] *Id.*, p. 23.

[30] *Id.*, pp. 22-23.

[31] *Id.*, p. 25.

***11** Simno also testified that, contrary to Melancon's post-conviction argument, his past experience of inappropriate contact by a priest had absolutely no emotional effect on him or on his presentation of Melancon's defense.[34] He also denied that this incident led him to favor or sympathize with the victim on cross-examination.[35]

Having reviewed this testimony, there is more than sufficient information to support the state trial court's finding that the decision to address the civil settlements and the adult relationship between Melancon and the witness was part of the defense strategy or theory. Counsel apparently believed that the jury would be impressed in a credibility context by the fact that the circumstantial allegations of both the victim and the witness resulted in substantial monetary settlements. The fact that this defense was not successful does not stand alone to establish deficient performance. *Martinez v. Dretke*, 99 Fed. Appx. 538, 543 (5th Cir.2004).

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[32] *Id.*, pp. 24-26, 39.

[33] *Id.*, pp. 27, 29, 31.

[34] *Id.*, pp. 53-54, 59.

[35] *Id.*, p. 54.

> "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."
>
> *Strickland,* 466 U.S. at 689 (citations omitted).

In this case, Melancon has not shown that counsel's attempt to establish the falsehood of the allegations against him by introducing to the jury the civil settlements or evidence of a witness's adult consensual relationship with Melancon was either unreasonable under the circumstances or deficient performance. Melancon's allegations against his trial counsel point to no constitutional deficiency in, or prejudice resulting from, their actions, as required by *Strickland. Miller,* 200 F.3d at 282 (quoting *Barnard v. Collins,* 958 F.2d 634, 642 (5th Cir.1992)). Melancon has failed to establish that he is entitled to relief on this claim under *Strickland* or that any denial of relief on this claim by the state courts was contrary to, or an unreasonable application of, Supreme Court law.

B. *Appellate Counsel's Actions*

Melancon alleges that his appellate counsel failed to challenge the trial court's ruling on the *Prieur* motion to admit evidence of the sexual abuse of the witness and failed to challenge the sufficiency of the evidence at trial on appeal.[36] The trial court ruled that evidence of abuse under age 17 would be admissible.

In *State v. Prieur*, 277 So.2d 126 (La.1973), the Louisiana Supreme Court held that evidence of other acts of misconduct is *generally* not admissible to show the defendant's bad character, but that such evidence is allowed to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act or transaction that is part of the subject of the present proceeding." *See also* La.Code Evid. art. 404(B)(1); *State v. Jackson*, 625 So.2d 146, 148 (La.1993).

***12** Although the record does not contain the motion transcript, the parties concede in their respective written submissions that, prior to Melancon's trial, the state trial court ruled in a *Prieur* hearing, that a pattern of sexual acts with juvenile boys had been established and evidence of sexual intercourse with a witness between the ages of 13 and 17 would be admissible.[37] This ruling was unsuccessfully challenged by Melancon in the Louisiana First Circuit. Melancon's trial counsel also objected at trial to the testimony of the witness and unsuccessfully moved three times for a mistrial as a result.

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[36] St. Rec. Vol. 4 of 13, Motion to Admit Evidence of Prieur/Other Acts/Crimes, 4/24/96.

[37] *See* St. Rec. Vol. 9 of 13, 1st Cir. Opinion, 98-KA-1146, p. 18, 5/14/99.

Melancon now suggests that appellate counsel should have challenged the trial court's *Prieur* ruling on direct appeal. Appellate counsel, Ed Greenlee, testified at the post-conviction hearing that he had no notes as to why he did not raise a direct challenge to the *Prieur* ruling.[38] He also testified that he generally would not raise an issue if he determined that it was without merit. He further testified that he felt that the appeal issue raised was adequate to bring before the court the question regarding the propriety of the testimony of the witness in light of the *Prieur* ruling.[39]

While the *Prieur* ruling was not directly challenged on appeal, appellate counsel did in fact argue that the trial court erred in denying the defense's motions for mistrial arising from the "other crimes" testimony.[40] When addressing this claim on direct appeal, the Louisiana First Circuit noted that the defense moved for a mistrial after the witness described three sexual acts or incidents by Melancon which were not related to or similar to the sex acts against the victim. In addressing whether a mistrial should have been granted, the appellate court reviewed the specific testimony to determine whether, under Louisiana law, the testimony was admissible under La.Code Ev. art. 404(B)(1) to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. The court further noted that Louisiana law would also require under *Prieur* that the State prove, among other things, that the defendant committed the other acts and the court must provide a charge to the jury that the "other crimes" evidence serves this limited purpose.

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[38] St. Rec. Vol. 11 of 13, Transcript of Post-Conviction Hearing, pp. 63-64, 8/18/04.

[39] *Id.*, at p. 72-73, 80.

[40] *Id.*, p. 17 (assignment of error No. 4)

The court then commented that the testimony of the witness in general tended to show Melancon's lustful disposition and a pattern of committing sex acts with minor boys. The court also resolved that the probative value of the testimony regarding oral sex and the viewing of homosexual videos, which were "less serious" crimes than the charged offense of anal rape, outweighed its prejudicial effect.[41]

On post-conviction review, the state trial court referenced the appellate court's findings. After considering appellate counsel's testimony and the appellate court's ruling, the court determined that a direct challenge to the *Prieur* ruling would have been meritless and no prejudice resulted from counsel's actions.

***13** The Louisiana courts have already determined that the testimony was admissible under state law to show Melancon's lustful disposition and a pattern of molesting overweight, shy, young altar boys. It is understandable that Melancon would have preferred to keep this evidence from the jury, but its admission was a matter of state law.

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[41] *Id.*, p. 22.

The issue before this court is whether the failure to challenge the trial court's decision was deficient performance and prejudicial to the outcome of the case. Melancon has made no such showing.

As determined by the state trial court, appellate counsel's decision not directly to challenge the *Prieur* ruling was not unreasonable and appears to have been made after thorough review of the record, potentially meritful claims, and discussions with trial counsel. Most significant to a showing that there was no prejudice is the fact that, no matter how the evidentiary challenge was presented, the appellate court in fact reviewed the testimony of the witness and found that it was appropriate under La.Code Ev. Art 404(b). The *Strickland* decision requires that Melancon prove both deficient performance and prejudice. He has not done so.

Melancon also claims that his appellate counsel should have challenged on appeal the sufficiency of the evidence and, having failed to do so, he has been denied the right to make this challenge. The state trial court determined that appellate counsel decided not to raise such a claim on appeal in light of the state of the case law in applying the *Jackson v. Virginia* standard. The state trial court noted that counsel testified at the post-conviction hearing that the case hinged upon a credibility determination for the jury and that a sufficiency of the evidence claim would have been meritless. Thus, his decision was a strategic choice, and Melancon has failed to prove deficient performance.

In addition, the trial court also reviewed the evidence and determined that there was sufficient evidence to support the verdict. Counsel's decision was based on the well-established standards of *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires the court to determine whether, after identifying the elements of the offense as defined by state substantive law and viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime to have been proven beyond a reasonable doubt. *Jackson,* 443 U.S. at 319; *Donahue v. Cain,* 231 F.3d 1000, 1004 (5th Cir.2000); *Gilley v. Collins,* 968 F.2d 465, 467 (5th Cir.1992); *Guzman v. Lensing,* 934 F.2d 80, 82 (5th Cir.1991). The court's consideration of the sufficiency of the evidence extends only to what was presented at trial. *Guzman,* 934 F.2d at 82 (citing *Tyler v. Phelps,* 643 F.2d 1095, 1102 (5th Cir.1981)).

The record before this court does not contain a full trial transcript. It does contain, however, a transcript of the testimony of the victim, which contained the most damaging testimony.[42] Furthermore, the facts summarized and relied upon by both the State and Melancon track those factual findings made on direct appeal by the Louisiana First Circuit.

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[42] Given By the Victim, 6/13/96.

*14 Under Louisiana law, to prove aggravated rape of a child under 12 years old, the State must prove: (1) anal or vaginal penetration deemed to be without consent of the victim because of (2) the victim's age at the time of the rape. *State v. Williams,* 950 So.2d 126 (La.App. 2d Cir.2007); *State v. Wright,* 690 So.2d 850, 856 (La.App. 3d Cir.1997). Moreover, "[a]ny penetration, however slight, ... is sufficient." *State v. Self,* 719 So.2d 100, 101 (La.App. 3d Cir.1998). This is a general intent crime and the victim's testimony alone is sufficient to establish the fact of penetration. *State v. Maise,* 805 So.2d 1141, 1151 (La.2002); *State v. Mitchell,* 453 So.2d 1260 (La.App. 3d Cir.1984).

The findings of fact outlined by the Louisiana First Circuit on direct appeal, as corroborated by the trial transcript, show that the victim became an altar boy under Melancon's tutelage shortly after his eighth birthday. Within the first year, Melancon on occasions rubbed his stomach, fondled his genitals, and repeatedly, anally raped him. Melancon gave the boy gifts and bought him meals. The rapes and gift-giving occurred twice a month or more and continued for years. During the period of continued sexual abuse, the victim suffered repeated incidents of rectal bleeding and tearing, which healed with medical treatment, only to recur after each rape. The rectal bleeding ceased when Melancon was transferred away and the abuse stopped.

The jury also heard the witness's recounting of his molestation by Melancon between the ages of 13 and 17. The jury also heard the testimony that the same witness had consensually continued that relationship after age 17 to age 24. The defense offered testimony to show that no one ever saw the victim in the rectory and that no other witness knew of any inappropriate activity or sexually explicit materials in Melancon's room.

The evidence in the record is more than sufficient to establish that the victim was 8 or 9 years old when the anal rapes began. It is also sufficient to support a finding that Melancon raped the victim on numerous occasions.

For these reasons, the trial court's finding that appellate counsel was not deficient, nor his actions prejudicial, was not contrary to *Strickland*. The decision not to raise the issue was the strategic resolve of his review of the record and discussions with trial counsel. In addition, the evidence adduced at trial was sufficient under *Jackson* to support the jury's verdict; therefore, no prejudice arose from counsel's failure to raise the issue on direct appeal.

The denial of relief on this claim was not contrary to, or an unreasonable application of, Supreme Court precedent. Melancon is not entitled to relief on this claim.

VI. *DENIAL OF DUE PROCESS AND A FAIR TRIAL*

Melancon alleges that he was denied due process and a fair trial because of the prosecutor's animus towards Melancon and the Catholic church and due to adverse publicity surrounding the case. Melancon argues that the prosecutor, interested in his own political career, began a probe of the Catholic church in an effort to find other, unrelated child molestation incidents. He contends that this investigation, along with continual, derogatory stories about the case against Melancon, were continually reported in the press.

***15** Melancon also points to testimony at the post-conviction hearing which tended to show, by his estimation, that one-third of the potential jurors knew about the case and the majority had been victims, or knew victims, of child abuse. Melancon suggests that the district attorney's animus, coupled with the publicity, demonstrate that the denial of the motion to change venue violated due process and insured that Melancon could not get a fair trial in Terrebonne Parish.

The state trial court offered the last reasoned opinion on this issue on post-conviction review. The court determined that the issue of prosecutorial misconduct had actually been addressed by the Louisiana First Circuit on pages 23 and 24 of its opinion, where it determined that no such misconduct was evident from the record.[43] The court resolved that the references at trial to the Catholic diocese, churches and priests were made for legitimate purposes in the presentation of evidence.

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[43] Vol. 9 of 13, 1st Cir. Opinion, 98-KA-1146, p. 23-24, 5/14/99.

The court also resolved that the Louisiana First Circuit on direct appeal had considered the negative publicity in connection with the motion to change venue. The appellate court found, as discussed previously in this report, that there was no prejudice or error resulting from the denial of the motion to change venue and that Melancon had not established that his trial was rendered unfair as a result of being held in Terrebonne Parish.

For Melancon to establish that his trial was unfair in violation of due process, he would have to show a "failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba v. People of the State of California,* 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941); *Peters v. Whitley,* 942 F.2d 937, 940 (5th Cir.1991) (Habeas review is proper only to determine whether a state trial judge's error is so extreme as to render the trial fundamentally unfair or violate an explicit constitutional right.) Furthermore, claims of prosecutorial misconduct like those raised by Melancon must be evaluated under plain error analysis to determine if the alleged violations "seriously affected the fairness, integrity, or public reputation of judicial proceeding and resulted in a miscarriage of justice." *United States v. Goff,* 847 F.2d 149, 162 (5th Cir.1988), *cert. denied,* 488 U.S. 932, 109 S.Ct. 324, 102 L.Ed.2d 341 (1988) (citing *United States v. Livingston,* 816 F.2d 184, 195 (5th Cir.1987)). Melancon, in this case, has not established a violation of due process or that his trial was unfair.

Melancon references in his brief certain quotes by the prosecutor in which he mentioned the Catholic church when discussing Melancon's defense. Ironically, Melancon refers to portions of the transcript where the prosecutor is accusing Melancon of using or hiding behind the cloak of the Catholic church to impute his innocence.[44] Nevertheless, Melancon has not pointed to any portion of the record where the prosecution could be accused of tainting the jury or the trial by confusing the church as a whole with the specific acts committed by Melancon. It is clear from the record before this court that the evidence tended to establish that Melancon, not the Catholic church, was guilty of the aggravated rape for which he was convicted.

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[44] Rec. Doc. No. 1, Petition, Memorandum in Support, p. 32.

*16 Melancon's negative publicity argument is nothing more than a restated challenge to the denial of his motion to change venue, a claim not raised here. As conceded by Melancon, the negative publicity prevailed prior to trial and prior to voir dire. The record reflects that the trial court placed a gag order on the parties, the jury pool was pre-screened by questionnaire at the request of the defense, and voir dire was conducted in discrete panels so as not to taint the entire pool. These actions support a finding that the state trial court attempted to protect the integrity of the voir dire and the trial.

Melancon also has not established that any member of the actual jury was predisposed to a guilty verdict, tainted by the press or publicity, or said or did anything to suggest prejudice or animus against Melancon. Melancon simply argues that, because so many panel members expressed a predisposition, a fair trial could not be had. However, the references to persons excused because of their predisposition is a red herring in determining whether the actual jury was prejudiced in a way to deny Melancon a fair trial. He has made no such showing to this court or to the state courts.

Melancon has failed to establish a denial of due process or that he was denied a fair trial. The state court's' denial of relief on this claim was not contrary to, or an unreasonable application of, Supreme Court law. Melancon is not entitled to relief on this claim.

RECOMMENDATION

For all of the foregoing reasons, it is RECOMMENDED that the petition of Robert Melancon for issuance of a writ of habeas corpus under 28 U.S.C. § 2254 be DENIED and DISMISSED WITH PREJUDICE.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within ten (10) days of entry of this order. (10) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1430 (5th Cir.1996) (en banc).

959 So.2d 502, 2006-3003 (La. 6/22/07)
(Cite as: 959 So.2d 502)

Supreme Court of Louisiana.
STATE of Louisiana
v.
Robert MELANCON.
No. 2006-KP-3003.

June 22, 2007.

In re Melancon, Robert;-Defendant; Applying for Supervisory and/or Remedial Writs, Parish of Terrebonne, 32nd Judicial District Court Div. B, No. 264,226; to the Court of Appeal, First Circuit, No. 2006 KW 1520.

Denied.

673 So.2d 613, 96-0921 (La. 5/17/96)
(Cite as: 673 So.2d 613)

Supreme Court of Louisiana.
STATE of Louisiana
v.
Robert MELANCON.
No. 96-KK-0921.

May 17, 1996.

In re State of Louisiana;-Plaintiff(s); applying for supervisory and/or remedial writs; to the Court of Appeal, First Circuit, No. KW96 0313; Parish of Terrebonne, 32nd Judicial District Court, Div. "B", No. 264,226.

Denied.

WATSON, J., not on panel.

665 So.2d 1173, 95-3002 (La. 1/4/96)
(Cite as: 665 So.2d 1173)

Supreme Court of Louisiana.
STATE of Louisiana
v.
Father **Robert MELANCON**.
No. 95-KK-3002.

Jan. 4, 1996.

In re Melancon, Robert, Fr.;-Defendant(s); applying for supervisory and/or remedial writs; Parish of Terrebonne, 32nd Judicial District Court, Div. "B", No. 264,226; to the Court of Appeal, First Circuit, No. KW95 2526.

Granted. Defendant's bond is reduced to $500,000.

***1174** CALOGERO, C.J., and LEMMON, J., concur in part and dissent in part, and under the circumstances shown would reduce bail to 200,000.

660 So.2d 484, 95-2091 (La. 9/22/95)
(Cite as: 660 So.2d 484)

Supreme Court of Louisiana.
STATE of Louisiana
v.
Father **Robert MELANCON**.
No. 95-KK-2091.

Sept. 22, 1995.

In re Larpenter, Jery J., Sheriff;-Third Party(ies); applying for supervisory and/or remedial writs; to the Court of Appeal, First Circuit, No. KW95 1440; Parish of Terrebonne, 32nd Judicial District Court, Div. "B", No. 264226.

Denied. Moot.

WATSON, J., not on panel.

660 So.2d 465, 95-2005 (La. 9/22/95)
(Cite as: 660 So.2d 465)

Supreme Court of Louisiana.
STATE of Louisiana
v.
Father **Robert MELANCON**.
No. 95-KK-2005.

Sept. 22, 1995.

In re State of Louisiana;-Plaintiff(s); applying for writ of certiorari and/or review, writ of prohibition, writ of mandamus, supervisory/remedial writs; to the Court of Appeal, First Circuit, No. KW95 1440; Parish of Terrebonne, 32nd Judicial District Court, Div. "B", No. 264226.

Granted. Judgment of the court of appeal is vacated and set aside. Judgment of the trial court is reinstated insofar as it required the certified check to be made payable to and delivered to the sheriff. A certified check may be received as bail but without conditions. The check must be negotiable. Case remanded to the district court for further proceedings.

KIMBALL, J., would grant the writ.
WATSON, J., not on panel.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 98 KA 1146

STATE OF LOUISIANA

VERSUS

ROBERT LESTER MELANÇON

Judgment Rendered: May 14, 1999

* * * * * *

Appealed from the
Thirty-Second Judicial District Court
in and for the Parish of Terrebonne, Louisiana

Honorable John R. Walker, Judge

* * * * * *

Richard P. Ieyoub, Attorney General Douglas W. Freese Kathleen E. Petersen Baton Rouge, LA	Attorneys for State-Appellee
Edward R. Greenlee John Di Giulio	Attorneys for Defendant-Appellant

Baton Rouge, LA
and
George Simno, III
New Orleans, LA

* * * * * *

BEFORE: LeBLANC, FOGG, AND KUHN, JJ.

FOGG, J.

The defendant, Robert Lester Melançon, a Roman Catholic priest, was charged by grand jury indictment with aggravated rape of a child under the age of twelve, a violation of LSA-R.S. 14:42. He pled not guilty. After a trial, the jury returned the verdict of guilty as charged. The trial court sentenced the defendant to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. The defendant now appeals.

FACTS

In 1985, the defendant became the pastor at Annunziata Church, a Catholic Parish in Terrebonne Parish. A few months later, the defendant talked with a parishioner about her younger son, K.P., becoming an altar server for the church. The family's older son was already serving as an altar boy when the defendant arrived at the church. K.P., overweight for his age, was shy and did not have a lot of friends. When K.P. began serving as an altar boy, his service included Mass on Sundays, weddings, baptisms, and funerals. After most of the services, the defendant would bring K.P. home. During the years that K.P. served as an altar boy, the defendant would occasionally take him out to eat and buy him gifts, such as cassette tapes and clothes.

K.P. testified that his abuse began casually, by the defendant inviting him upstairs to his bedroom in the church rectory. He watched television with the defendant in the priest's bedroom with the door closed. At first no touching occurred. Then, the defendant began rubbing K.P.'s stomach. He progressed to kissing K.P.'s face and chest and fondling his genitalia. At first, defendant touched K.P. on the outside of his clothing.

The first acts occurred in the summer, about one year after K.P. met the priest. K.P. was about nine and one-half years old when the defendant began having anal intercourse with him. The defendant continued having intercourse with K.P., averaging one or two times a month until the priest was transferred to a different church. The acts usually occurred after 5:00 p.m.

K.P., who was nineteen years old at the time of the trial, admitted that he revealed he was homosexual after his eighteenth birthday. He denied that his "coming out" had anything to do with his allegations against the defendant. Rather, K.P. stated that he waited until his eighteenth birthday to reveal his sexual orientation because "high school people are very, very scared of things that are different." K.P. also denied that his allegations were motivated by his civil lawsuit, which was settled shortly before the criminal trial for about $800,000.

On cross-examination, K.P. admitted that the majority of the rapes occurred after he had assisted at weddings or funerals. He did not recall any specific acts occurring on Sundays in connection with his service at baptisms. K.P. further testified that he never served at weddings or funerals during school hours and never left the rectory on his own and walked home. He could clearly recall only two incidents in which he had been raped; one occurred when the defendant and K.P. returned to the rectory from a funeral. K.P. testified that the first act of anal intercourse occurred in the summer of 1986. Although he did not clearly remember all the incidents, he was certain that he had been raped while he was in the sixth grade.

At first, K.P. stated that he never saw anyone in the rectory on the occasions that the rapes occurred; then he admitted that he saw Virginia Chatagnier, the housekeeper, on many occasions in the rectory. At those times he would usually greet the housekeeper. During her testimony, Ms. Chatagnier testified that occasionally, after K.P. and his brother served at morning Mass, she would see them with the defendant, who indicated that he was taking the boys to breakfast and then on to their school. For about the year and a half before the defendant was moved from Annunziata Church, she was working in the rectory between 5:00 p.m. and 7:00 p.m. to prepare dinner.

Between the years of 1985 and 1991, K.P. had rectal bleeding. K.P.'s mother took him to the pediatrician, who examined K.P. and found a tear in the rectum. The doctor assumed the tear was caused by constipation and prescribed stool softeners and mineral oil, which would stoop the bleeding in a few days. However, according to the mother, every few weeks the bleeding would return. When the defendant left the church parish in 1991, K.P.'s rectal bleeding did not return.

In May of 1992, K.P. told his cousin, Deacon Jeff Heipl, that he had been molested by the defendant. K.P. stated that the acts had stopped, but did not reveal the extent of the abuse. K.P. did not want Deacon Heipl to inform the victim's parents.

In April of 1995, K.P. disclosed to a friend that he had been sexually abused by the defendant in the past. This friend encouraged K.P. to tell the high school guidance counselor. When K.P. revealed the abuse, school officials reported the information to law enforcement authorities. K.P., who was having suicidal thoughts, was then admitted to a psychiatric hospital for about a week. After K.P. returned home, his parents were contacted by an attorney for the Catholic Diocese who wanted to talk to K.P. Following this unsolicited contact, K.P.'s parents filed a civil lawsuit against the defendant and the Catholic Church for the victim's sexual abuse.

R. F. testified that he was eleven years old when he met the defendant, who officiated at a Mass for his deceased father. At the time, the priest encouraged R.F.'s mother to allow her son, an overweight child, to become an altar boy. After R.F. became an altar boy, he was sexually abused by the defendant. The abuse occurred in the rectory and began with massaging and fondling by the priest. R.F. stated he was thirteen years old when the acts led to anal intercourse. During his testimony, R. F. also identified greeting cards sent to him by the defendant which referred to "Willie." R. F. testified that the defendant used this name to refer to R.F.'s penis. R.F. further admitted that he settled a civil lawsuit against the Catholic Church and the defendant for $30,000.00.

Doctor Scott Benton, the director of the Child Abuse Program at Children's Hospital in New Orleans, testified that the Terrebonne Parish District Attorney's Office requested that he examine K.P. In conjunction with the physical examination in July of 1995, K.P. related that when he was between the ages of eight and fourteen, the defendant sexually molested him. The medical history reported by K.P. indicated the acts included fondling and anal intercourse. The victim also told the doctor that the priest had posters of semi-nude women in his bedroom. Doctor Benton did not report any abnormal physical findings, but explained that this was not unusual, because the tissue around the anus is designed to stretch and heal without scarring.

The defense counsel denied the acts ever occurred. In an attempt to show that the allegations were false, the defendant presented testimony of witnesses who lived or worked in the rectory. Several witnesses testified that they never saw K.P. in the rectory. These witnesses included Father Leopold Skorogod,[59] who lived in the rectory and was regimented in his daily routine. He always watched television in a room on the first floor of the rectory in the evenings after 5:00 p.m. until about 10:00 p.m. Father Leopold testified that he never saw K.P. in the rectory. While he stated that he had an unobstructed view of the rear door from his chair while watching television in the meeting room, he admitted that his view of the stairway leading to the second floor was partially blocked. However, because of the creaking stairs, he would know if someone was using the stairs.

Harriet Pellegrin, the secretary and bookkeeper who worked on the first floor of the rectory, never recalled seeing K.P. in the rectory.

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[59] This priest testified as to his actual name; he was known by the name Father Leopold and will referred to as such.

However, she admitted that when she was in her office she did not know who came in or out of the rectory. Many of the witnesses asserted that the stairs leading to the second floor creaked and that the walls were not well insulated. However, in order to enter the defendant's bedroom, a person did not have to pass the bedroom of others. Several witnesses, who had access and an opportunity to go into the defendant's room testified that they never saw posters in the priest's bedroom depicting bee advertisement or semi-nude women.

The defendant also presented the testimony of Terry Campbell, who stated that while on a youth trip, K.P. confided in her that he had been touched in an inappropriate manner by Father Morrison, another priest; he did not accuse the defendant of any inappropriate touching. K.P. also told her that during the trip he did not want to be assigned a room with a priest because of the past sexual touching and was reassigned a room with Deacon Heipl.

MOTION TO CHANGE VENUE

In assignment of error number one, the defendant argues that the court erred when it refused to grant his motion to change venue. He contends that knowledge of the case by a large percentage of potential jurors and the notoriety of the case in the area justified the change of venue. The defendant also argues that the fact that the trial judge ordered that the voir dire process be closed to the public and the prosecutor's statement about comments he received by the public supported this change of venue. The state argues that the defendant did not prove that he was prejudiced by publicity to the extent that he could not or did not receive a fair trial.

Prior to trial, the court conducted a hearing on the motion to change venue. At that time, the defendant introduced copies of over thirty newspaper articles and editorials and a television videotape of news reports regarding the case. The defendant also presented the testimony of Hartwell M. Doty, a public opinion pollster, regarding the selection of a fair and impartial jury in Terrebonne Parish. Mr. Doty, who was accepted as an expert in the field of public opinion polling, concluded that a fair jury could not be selected in Terrebonne Parish for the defendant's trial. The state did not present any witnesses. At the conclusion of the hearing, the trial judge acknowledged the publicity surrounding the case, concluded that the defendant had not made the required showing that a fair and impartial jury could not be selected and denied the motion to change venue. The judge stated that a change of venue might be warranted after hearing potential jurors during the voir dire process.

Subsequently, after the actual voir dire of the first and second panels of prospective jurors, the defendant again urged the motion to change venue. The trial court deferred ruling on the motion until the voir dire was completed. During the voir dire of the fourth and last panel of prospective jurors, the defense counsel renewed the motion for change of venue and challenged that entire panel of prospective jurors based upon their exposure to publicity of the case. The trial court denied the challenge to the entire panel and denied the motion to change venue.

Although a defendant is not entitled to a jury that is totally ignorant of the case to be heard, the Louisiana Constitution grants the accused the right to trial by an impartial jury. *State v. Bennett*, 527 So. 2d 1126 (La.App. 1 Cir. 1988). See, LSA-Const. art. I, § 16. In deciding whether or not to grant a defendant's motion for change of venue, LSA-.Cr.P. art. 622 requires the trial court to consider if prejudice, undue influence, or any other reason will deny the defendant a fair trial in the parish in which the prosecution is pending. The court also must decide if such prejudice or influence will affect either the answers of the jurors on the voir dire examination or the testimony of the witnesses at trial. *State v. Clark*, 442 So. 2d 1129 (La. 1983).

Factors to consider in determining whether or not a change of venue is appropriate include: (1) the nature of the pretrial publicity and the particular degree to which it has circulated in the community; (2) the connection of governmental officials with the release of the publicity; (3) the length of time between the dissemination of the publicity and the trial; (4) the severity and notoriety of the offense; (5) the area from which the jury is to be drawn; (6) other events occurring the community which either affect or reflect the attitude of the community or individual jurors toward the defendant; and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire. *State v. Bell*, 315 So. 2d 307 (La. 1975).

In urging a change of venue for trial, the defendant must establish that there exists such prejudice in the collective mind of the community that a fair trial is impossible. The defendant must show more than mere public knowledge of facts surrounding the offense to be entitled to have his trial moved to another parish. *State v. Wilson*, 467 So. 2d 503 (La.), cert. denied, 474 U.S. 911, 106 S.Ct. 281, 88 L.Ed.2d 246 (1985). In unusual circumstances, prejudice against the accused sufficient to mandate a change of venue may be presumed. This presumption of prejudice will attach only when the trial atmosphere is entirely corrupted by press coverage or when it is entirely lacking the solemnity and sobriety to which a defendant is entitled in a judicial system of fairness. *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed2d 344 (1977); **Clark**, 442 So. 2d at 1134; see, *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct.2031, 44 L.Ed2d 589 (1975). If prejudice is not presumed, the defendant must establish the existence of actual prejudice on the part of prospective jurors. See, *State v. Goodson*, 412 So. 2d 1077 (La. 1982).

Whether or not a defendant has made the showing required for a change of venue is a question left to the trial court's sound discretion, which will not be disturbed on appeal absent an affirmative showing of error and abuse of that discretion. *Wilson*, 467 So. 2d at 512. Although the trial court possesses a broad range of discretion in this area, the reviewing court is required to make an independent evaluation of the facts to determine whether or not the accused received a fair trial unfettered by outside influences. *State v. Daniels*, 628 So. 2d 63 (La.App. 1 Cir. 1993), writ denied, 94-3044 (La. 11/15/96); 682 So. 2d 752.

We conclude the defendant has failed to show that there was either actual or presumed prejudice against him to the degree that a fair trial was impossible. The record indicates that at the time of the initial hearing on the motion to change venue the defendant introduced evidence of numerous media reports. That evidence included a videotape of television news reports and copies of numerous news articles and in print media. The reports do not appear to sensationalize the offenses.

The record also shows the trial judge, prosecutor, and defense counsel conducted a thorough voir dire of four panels of prospective jurors at the time of the trial. The examination process consisted of initially examining the entire panel as a group and individual questioning of some prospective jurors. During their questioning as a group, many members indicated that they had some knowledge of the case. The source of this knowledge was from television reports, newspaper articles, or other persons. Almost every person with knowledge of the case stated he or she had no opinion on the defendant's guilt or innocence and was able to set aside this information. Also, during this phase, any prospective juror who expressed that he or she could not be fair, whether or not they had knowledge of the case, was excused by the trial court.

The defendant showed that there was a high degree of public knowledge of the case. However, there was no showing that this knowledge prejudiced the defendant and prevented him from receiving a fair trial. Therefore, after carefully examining the record, we do not find the defendant carried his burden of proving he was entitled to a change of venue. This assignment of error lacks merit.

CHALLENGE FOR CAUSE

In assignment of error number two, the defendant argues that the trial court erred in granting challenges for cause of two prospective jurors, Timothy Lewis and Melvin Picou. Specifically, the defendant argues that the brief conversation between the two prospective jurors before and during the voir dire examination was innocuous and did not justify the state's challenge for cause. The state argues that the trial court's ruling granting the challenges was not an abuse of discretion.

During the course of voir dire questioning, Mr. Lewis, one member of the first panel of potential jurors, stated that before the jury selection began, an acquaintance, Mr. Picou, told him the matter might be the "Melançon case." During questioning of the second panel of the venire, Mr. Picou stated that he saw Mr. Lewis after questioning of the first panel.

Mr. Lewis told him that during the examination, he admitted to prior convictions. Mr. Picou denied telling Mr. Lewis that the matter involved the defendant; he said that he first learned about the case in the jury room.

In granting the state's challenge for cause as to both Mr. Lewis and Mr. Picou, the trial court stated:

> THE COURT:
>
> I'm going to grant the challenges for cause. First of all, because there was some discussion. My concern with Mr. Picou is that once Mr. Picou himself had – he divulged upon questioning evidence of his past criminal history. He was advised in advance that this sort of questioning would be coming. This is the reason we require jurors not to discuss their testimony because we do not want to inhibit their responses.
>
> Now the question arises in my mind we have one juror by the name of Tim Lewis saying he's the guy that told me what case it was going to be. Obviously someone is not telling the truth. We won't be able to tell who it is. Based on that I'm going to excuse both Mr. Melvin Picou and Timothy Lewis

> for cause. Now Mr. Lewis is going to sit here for the duration of this trial.

LSA-C.Cr.P. art. 797 provides the grounds for challenges for cause. That article states, in pertinent part:

> The state or the defendant may challenge a juror for cause on the ground that:
>
> . . . .
>
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;
>
> . . . .
>
> (4) The juror will not accept the law as given to him by the court. . . .

A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the prospective juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to the law reasonably may be inferred. *State v. Thompson*, 489 So. 2d 1364 (La.App. 1 Cir.), writ denied, 494 So. 2d 324 (La. 1986). A trial court is vested with broad discretion in ruling on challenges for cause and these rulings will only be reversed when a review of the voir dire as a whole reveals an abuse of discretion. *State v. Connolly*, 96-1680 (La. 7/1/97); 700 So. 2d 810.

We have carefully reviewed the voir dire transcript concerning prospective jurors Mr. Lewis and Mr. Picou, who were challenged for cause by the state. We find no abuse of the trial court's broad discretion in the grant of the state's challenges for cause. *State v. Huls*, 95-0541 (La. App. 1 Cir. 5/29/96; 676 So. 2d 160, writ denied, 96-1734 (La. 1/6/97); 685 So. 2d 126. This assignment of error lacks merit.

HEARSAY

In assignment of error number three, the defendant contends that the trial court improperly allowed the introduction of hearsay testimony of a doctor as to statements of the victim. Specifically, the defendant argues that since the victim saw the doctor solely for diagnosis and not for treatment, the victim's history was not admissible as a hearsay exception under LSA-C.E. art. 803(4). The defendant argues that the state used this testimony to bolster the alleged victim's testimony. He further argues that the trial court erroneously concluded that because Dr. Benton was qualified as an expert, he could testify as to the medical history and that this evidence could not be used to prove the sexual act occurred.

The state argues that the defendant has waived his right to seek review of this ruling by failing to make a contemporaneous objection. The state acknowledges that the defendant tried to prevent Dr. Benton's testimony by filing a pre-trial motion in limine and objecting at trial moments prior to when Dr. Benton took the stand. However, the state contends that the trial court did not make a ruling on the motion in limine prior to trial and advised the defense counsel to object as Dr. Benton testified. Because counsel did not object during the direct examination of Dr. Benton and because the defense counsel questioned the doctor about the medical history on cross-examination, the state contends that there was no contemporaneous objection. Alternatively, the state argues that the testimony of the victim's medical history was admissible as a hearsay exception under LSA-C.E. art. 803 (4) and as the basis of an expert's opinion under LSA-C.E. arts. 703 and 705B. The state further argues that the error, if any, in introducing the medical history related by the victim, was harmless, in light of the victim's own testimony.

Initially, we conclude that the defendant's motion in limine to exclude Dr. Benton's testimony preserved the right of review as to this testimony. LSA-C.Cr.P. art. 841A provides that an irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. However, the requirement of an objection does not apply to the court's ruling on any written motion. LSA-C.Cr.P. art. 841B. As explained by the Official Revision Comment, "[T]he written motion serves to put the court and the other party on notice."

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." LSA-C.E. art. 801(C). Hearsay is inadmissible unless it falls within an exception. LSA-C.E. art. 802.

LSA-C.E. art. 803 (4) provides for a hearsay exception as follows:

> **Art. 803. Hearsay exceptions; availability of declarant immaterial**
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> **(4) Statements for purposes of medical treatment and medical diagnosis in connection with treatment.** Statements made for purposes of medical treatment and medical diagnosis in connection with treatment and describing medical history, or past or present symptoms,

> pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis in connection with treatment.

The Official Comments to Exception (4), in pertinent part, are as follows:

> (a) Paragraph (4) clarifies Louisiana law. See State v. Andrews, 369 So.2d 1049 (La. 1979), discussed in Pugh & McClelland, "The Work of the Louisiana Appellate Courts for the 1978-1979 Term, Evidence," 40 La.L.Rev. 779, 793 (1980). This Paragraph follows Federal Rule of Evidence 803 (4) but is narrower than Federal Rule of Evidence 803 (4). Unlike Federal Rule 803 (4), this Paragraph excludes from its coverage statements made solely for the purpose of diagnosis. The reliability deemed generally to inhere in statements made for purposes of medical treatment does not extend to statements made solely for diagnosis.
>
> (b) The phrase "reasonably pertinent to treatment or diagnosis in connection with treatment" has been interpreted to limit the scope of this exception to the kind of statements that are usually relied upon by

> physicians in their diagnosis and treatment of patients. See United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), cert. denied 450 U.S. 1001 (1981). See also 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803 (4) [01] (1984). Thus, statements as to the cause of a condition not reasonably pertinent to diagnosis or treatment of it are not within the ambit of this exception. See Fed.R.Evid. 803 (4), Advisory Committee's Note; Weinstein, supra.
>
> (c) The adoption of this except does not affect the admissibility of testimony by an expert witness as to the basis for his opinion, a matter addressed in Article 705.

At trial, Dr. Benton was allowed to testify as to his examination of the victim and the victim's statements given to him. Doctor Benton did not see the victim immediately after or during the molestation. Rather, the victim was referred to Dr. Benton by the District Attorney's Office several years after the acts of intercourse had stopped. Doctor Benton saw K.P. for forensic purposes, and because no physical findings were noted, did not treat him. However, in conjunction with his examination, Dr. Benton conducted an extensive physical examination and took a complete history. Given the reason for the victim's referral to Dr. Benton and the timing of the examination it is hard to conclude that Dr. Benton's testimony falls within this exception to the hearsay rule.

LSA-C.E. art. 703 provides that experts may testify as to the bases of their opinion testimony, as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The Official Comments to the above article provide, in pertinent part:

> (d) Under this Article the facts or data underlying the expert witness' opinion may properly be: (1) matters within his firsthand knowledge; (2) facts or data presented to him at trial, thus approving the use of hypothetical questions; and (3) under designated circumstances, facts or data not admissible in evidence (because, for example, their source is inadmissible hearsay), if they are of a kind reasonably relied upon by experts in the

> particular field in arriving at their opinions or inferences. . . .
>
> (e) Expert testimony based on inadmissible evidence presents special problems when it is offered against an accused in a criminal case. See Estelle v. Smith, 451 U.S. 454 (1981); 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 703 [4] (1981). The courts should take great care to prevent abusive practices from developing that would circumvent fundamental safeguards designed for the protection of those accused of crime.
>
> (f) The fact that the expert may base his opinion or inference on inadmissible evidence does not necessarily imply that the expert may relate such information to the jury. Whether he may do so is governed by Articles 705 and 403 of this Code.

LSA-C.E. art. 705B states that "[i]n a criminal case, every expert witness must state the facts upon which his opinion is based, provided, however, that with respect to evidence which would otherwise be inadmissible such bases shall only be elicited on cross-examination." As noted by the Official Comments to this article, the article "departs from the Federal Rule of Evidence 705 and changes prior Louisiana law by precluding reference on direct examination to inadmissible evidence forming the basis of the expert's opinion."

Furthermore, in Pugh, Force, Rault and Triche, Handbook on Louisiana Evidence Law 1998, the Author's Note to art. 705 elaborate on the prohibition in criminal cases preventing expert witnesses from disclosing this inadmissible evidence on direct examination as follows:

> (3) Since under Article 703 an expert witness may base his opinion on inadmissible evidence provided if is of "a type reasonably relied upon experts" in the particular field in question in forming the opinion, problems are presented relative to the expert's relating same to the trier of facts. Because of the constitutional right of confrontation the problem is more acute in criminal cases (see 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶705[01] and hence Article 705 (B) precludes an expert witness, on direct examination, from relating inadmissible evidence that may have formed the bases for his opinion. . . .

Assuming that Dr. Benton's testimony constitutes inadmissible hearsay, we find that any error committed by the trial judge in admitting this evidence, either as a hearsay exception under art. 803 (4) or as the basis for the doctor's opinion under art. 703, is harmless. In order to establish that error was harmless in this case, the state must prove that the admission of improper hearsay did not contribute to the defendant's conviction. *Arizona v. Fulminante*, 499 U.S. 279 111 S.Ct. 1246, 1257, 113 L.Ed.2d 302 (1991): *State v. Hearold*, 603 So. 2d 731 (La. 1992). The issue is whether the jury actually rested its verdict on properly admitted evidence, independently of the improper hearsay. In this case, the admission of Dr. Benton's hearsay testimony is harmless only if its effect is comparatively minimal so that it can be said it did not contribute to the verdict rendered.

Herein, the introduction of the inadmissible hearsay was not substantially prejudicial. The victim's statem4nts to the doctor were substantially the same as the victim's own testimony. In fact, the victim himself testified more extensively about the acts and offence committed against him by the defendant. After reviewing the entire trial transcript we conclude beyond a reasonable doubt that the jury did not rely on this improper hearsay evidence in determining that the defendant was guilty. Thus, the admission of this hearsay evidence, if erroneous, was harmless beyond a reasonable doubt. See, *State v. Hearold*, 603 So. 2d at 739. Therefore, there was no reversible error in allowing Dr. Benton to testify to the history given by the victim. This assignment of error lacks error.

MOTION FOR MISTRIAL AND PROSECUTORIAL MISCONDUCT

In assignment of error number four, the defendant contends that the trial court erred in denying his three motions for mistrial based upon the introduction of inadmissible other crimes evidence. In assignment of error number five, the defendant argues that the state's action in putting the "Catholic church and Catholic priests" on trial constituted prosecutorial misconduct which denied him a fair trial. The state contends that the trial court did not err in admitting the other crimes evidence and that there was no prosecutorial misconduct.

Prior to trial, the trial court conducted a **Prieur** hearing and ruled that based upon the evidence before it at that time, a pattern of sexual acts had been established. However, the court ruled that the evidence of sexual acts with other victims would be limited to those matters which would have happened when the witnesses were under seventeen years of age. The court further ruled that the state had shown a pattern of conduct which led to sexual intercourse with juvenile boys and that the sexual acts that took place with R.F. were admissible. The defendant's application for writs to review this ruling were denied by this court. *State v. Melançon*, 96 KW 1115 (La. App. 1 Cir. 6/5/96).

During the testimony of R.F., there were three instances when the defendant made motions for mistrial based upon the introduction of other crimes evidence. In the first instance, R.F. testified that the defendant had kissed his penis, an act not described by K.P. When the defendant objected and made his first motion for mistrial, the trial court denied the motion but admonished the jury that the other crimes evidence was offered for a limited purpose. Before the defendant's second motion for mistrial, R.F. testified that the defendant took him to the rectory of another diocese church and showed him x-rated videotapes of sexual acts involving homosexuals. In the third instance, R.F. testified that the defendant performed oral sex on him. There was no testimony that K.P. was shown any x-rated videotapes of sex acts or that the defendant performed oral sex on him. The defense counsel made separate motions for mistrial based upon this evidence. The trial court denied the second motion and again admonished the jury that the evidence was limited for the sole purpose of showing "guilty knowledge, absence of mistake or accident, intent, system, motive or identity." After the third motion for mistrial, the trial court concluded that it would defer ruling on the motion for mistrial until the next day of trial, but would give another admonition to the jury.

The next day of trial, argument was held on the pending motion for mistrial. The trial court denied the motion and gave extensive oral reasons. The court concluded that evidence of the showing of x-rated videotapes was known to the defendant prior to trial. With respect to evidence of oral sex between defendant and R.F., the court noted that this was a less serious crime than that for which the defendant was being tried and that it did not believe that the state deliberately elicited the evidence from the witness. Noting that it had admonished the jury each time the other crimes evidence came up, it denied the motion for mistrial.

In his brief to this court, the defendant also contends that the state asked open-ended questions to obtain the testimony of sex acts conducted after R.F. reached the age of seventeen, evidence which the trial court had previously ruled was inadmissible. The defendant further argues that evidence of consensual adult sex was used by the state as evidence of the defendant's bad character.

Generally, evidence of other acts of misconduct is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. In order to avoid the unfair inference that a defendant committed a particular crime simply because he is a person of bad character, other crimes evidence is inadmissible unless it has an independent relevancy besides simply showing a criminal disposition. *State v. Jackson*, 625 So. 2d 146 (La. 1993); *State v. Parker*, 625 So. 2d 1364 (La.App. 1 Cir. 1993), writ denied, 93-2832 (La. 2/25/94); 632 So. 2d 761.

LSA-C.E. art. 404 B (1) provides that:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other

> purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Additionally, the state is required to prove the defendant committed these other acts.[60] Even if

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[60] Regarding the standard of proof to be used for the other crimes evidence, this court stated in *State v. Wilkerson*, 96-1965, p. 4 (La.App. 1 Cir. 11/07/97); 704 So. 2d 1, 3-4, writ denied, 97-3038 (La. 4/3/98); 717 So. 2d 646:

> Before other-crimes evidence may be introduced, the State must prove the defendant committed the other crime. In *Prieur*, the Louisiana Supreme Court stated the applicable burden of proof was by clear and convincing evidence. See *Prieur*, 277 So. 2d at 129. Former Code of Evidence article 1103 reiterated this standard as the applicable burden of proof for the admission of other-crimes evidence. Article 1103, however was repealed in 1995. Code of Evidence article 1104, which was added in 1994, provides the burden of proof in a *Prieur* hearing "shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404." In *Huddleston v. United*

independently relevant, the evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. LSA-C.E. art. 403. Finally, the requirements set forth in *State v. Prieur*, 277 So. 2d 126 (La. 1973) must be met. Thereunder, the state must, within a reasonable time before trial, provide written notice of its intent to use other acts or crimes evidence and describe these acts in sufficient detail. The state must show the evidence is neither repetitive nor cumulative, and is not being introduced to show the defendant is of bad character. Further, the court must, at the request of the defendant, offer a

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> *States*, 485 U.S. 681, 689, 108 S.Ct. 1496, 1501, 99 L.Ed.2d 771 (1988), the United States Supreme Court indicated with regard to Rule 404 that the burden of proof is met if the fact-finder could reasonably conclude from the evidence that the defendant committed the act in question.
>
> The effect of the repeal of article 1103 and the addition of article 1104 on the burden of proof required for the admission of other-crimes evidence has not been settled by this court. However, we need not decide this issue in this case because the evidence at the **Prieur** hearing sufficiently met the higher burden of proof. (Footnotes omitted).

R.F. testified as to his abuse by defendant. He gave detailed information about the incidents and positively identified defendant as the perpetrator. Thus, using the higher burden of proof, there was sufficient evidence of the other crimes.

limiting instruction to the jury at the time the evidence is introduced. The court must also charge the jury at the close of the trial that the other crimes evidence serves a limited purpose and that the defendant cannot be convicted for any crime other than the one charged or any offence responsive to it.

In *State v. Miller*, 98-0301, pp. 3-5 (La. 9/9/98); 718 So. 2d 960, 962-963, the Louisiana Supreme Court, in addressing the admissibility of either acts of misconduct to show "lustful disposition," stated:

> Child sexual abuse cases raise special concerns for the judicial system not present in other criminal cases. Frequently, in cases involving the sexual abuse of children, the offense takes places in secret, the victim is young, vulnerable, and reluctant to testify, and there is often no physical or other evidence that abuse took place. As a result, special laws and rules have been passed to address the unique concerns presented in these types of cases. In further recognition of the need to treat child sexual abuse cases specially, some jurisdictions admit evidence of uncharged misconduct to show "lustful disposition" or "depraved sexual instinct" in cases involving sex crimes against children. Other courts have allowed the introduction of such evidence for purposes more traditionally associated with Article 404

(B), e.g., to establish a plan, motive, scheme, or design or to show intent. Indeed, Fed.E.Evid. 413 was recently amended to expressly allow the admission of other offenses of sexual assault by the defendant "for its bearing on any matter to which it is relevant."

. . . .

Louisiana has followed the national trend towards broader admissibility of other crimes evidence in cases involving alleged sexual abuse of minor children. Pugh, Handbook on Louisiana Evidence Law 1996, 284. This court first recognized the "lustful disposition" exception is *State v. Cupit*, where the defendant was charged with assault with intent to commit rape of his young niece. 189 La. 509, 179 So. 837 (1938). The state presented evidence the defendant had raped another niece and had been charged with the rape of yet another niece. This court held the evidence was admissible in that the "prior offenses . . . . clearly tended to show the lustful disposition the defendant bore towards his nieces, and his unnatural desire to have sexual intercourse with them; all of his nieces being children or tender age." 189 La. at 516, 179 So. at 839.

(Footnotes omitted).

In this case, the other acts of uncharged misconduct, sexual acts with R.F., a juvenile altar boy, tend to show the defendant's "lustful disposition" and a pattern of committing sex crimes with minor boys. The fact that the defendant had sexually molested another young boy tended to show he had a lustful disposition toward young boys. The other crimes evidence was substantially relevant for a purpose other than to show a probability that the defendant committed the instant crime because he is a man of criminal character. The evidence was admitted to show that the defendant had a system of past deviant behavior with juvenile boys, not to prove that he committed the instant crime because he committed other crimes in the past.

The only remaining issue is whether the probative value of the evidence outweighs its prejudicial effect. LSA-C.E. art. 403. The prejudicial effect of this evidence is outweighed by its probative value. First, the acts were similar to those committed against K.P. Additionally, these acts were less serious than the charged offense which involves acts of anal intercourse. Weighing all the relevant factors, we find the probative value of the evidence outweighs its prejudicial effect. See, *Miller*, 98-0301, p. 6; 718 So. 2d at 967; see also, *State v. Hawkins*, 633 So. 2d 301 (La.App. 1 Cir. 1993). Therefore, the trial court did not err in denying the defendant's motions for mistrial.

The defendant further argues that prosecutorial misconduct occurred by the state making this a prosecution of the Catholic Church and Catholic priests and prevented him from receiving a fair trial. In *Berger vs. U.S.*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935), the United States Supreme Court addressed the prosecutor's duty:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

As a general rule, courts are hesitant to reverse convictions on the basis of prosecutorial argument because jurors are generally repeatedly admonished that they must decide the case on the evidence and that the arguments of counsel are not evidence. *State v. Duplessis*, 457 So. 2d 604 (La. 1984). Additionally, great faith is placed in the idea that jurors will use their common sense, fair-mindedness, and ability to distinguish meaningful evidence from unwarranted comments. Each case must be examined on an individual basis to determine if the prosecutorial argument was so prejudicial as to require reversal of the defendant's conviction. *State v. Colligan*, 95-880 (La.App. 3 Cir. 8/7/96); 679 So. 2d 184.

We have carefully reviewed the record in this matter and do not find that prosecutorial misconduct occurred. While references were made to the Catholic Diocese, churches and priests, these references were made with a specific purpose. The reference by a witness, other than R.F. and K.P., to his own sexual abuse by a Catholic priest other than defendant, was for a specific purpose and to explain his actions in respect to the victim's disclosure of the abuse. We cannot say that the prosecution of this matter involved prosecutorial misconduct. These assignments of error lack merit.

CONVICTION AND SENTENCE AFFIRMED.

STATE OF LOUISIANA	32ND JUDICIAL DISTRICT COURT
VS. NO. 264,226	PARISH OF TERREBONNE
ROBERT L. MELANCON	STATE OF LOUISIANA

REASONS FOR DENIAL OF MOTION FOR POST CONVICTION RELIEF

Petitioner, Robert Melancon, was indicted by Terrebonne Parish Grand Jury and charged with the crime of aggravated rape. A jury trial was held June 12 through June 18, 1996 wherein petitioner was convicted and found guilty as charged. An appeal was taken to the First Circuit Court of Appeal which was denied. *State v. Melancon*, 98-1146 (La. App. 1Cir. 5/14/99) 739 So.2d 1017 (unpublished). Writs of Certiorari to the Louisiana Supreme Court were denied, *State v. Melancon*, 99-1708 (La. 12/10/99) 751 So.2d 243.

The petition now raises the following issues pursuant to post conviction relief:

1. Ineffective assistance of counsel:

   A. trial level; and

B. appellate level.

2. Denial of petitioner's rights to due process and a fair trial due to:

   A. insufficiency of evidence to support a verdict of guilty of aggravated rape;

   B. the prosecutor's demonstrated animus; and

   C. the adverse publicity surrounding the trial.

Petitioner's motion for Post Conviction Relief is denied with regard to all issues raised. The Court discusses in turn each issue raised and reasons for denial

1. INEFFECTIVE ASSISTANCE

A. Trial Counsel

During pre-trial proceedings the Court issued a gag order prohibiting the attorneys from commenting to the press concerning court proceedings. Simno violated the court order, was held in contempt of court, and a complaint with the bar association was filed. The contempt/bar complaint issue was resolved by virtue of a written apology to the trial Court. As a result of these pretrial actions, defense counsel filed a. motion to recuse the trial judge and also objected to the allotment system in the 32nd Judicial District. After hearings on the recusal of the trial judge and the propriety of the 32nd Judicial District allotment system, the Court denied the motion for recusal and overruled the objection to the allotment system. A writ of review was taken concerning the allotment issue. This writ was denied. Petitioner claims that the actions of George Simno and/or defense counsel had a "chilling" effect on petitioner's defense.

The Court notes that petitioner was represented by two (2) experienced criminal lawyers, George Simno and John Di Giulio. A review of the record shows' that both attorneys participated during all hearings and stages of all pre-trial and trial proceedings. Defense counsel filed pre-trial motions, objected to the Court's rulings on same, and appealed said rulings. Their actions did not undermine the process; they served to protect petitioner's rights at the trial level and preserve alleged error for review on appeal. In regard to this complaint defense counsel did nothing to prejudice the outcome of petitioner's trial.

Petitioner next alleges defense counsel failed to exclude evidence of monetary settlements that had been reached between the Archdiocese and the victim and witnesses in this case. Petitioner makes an additional complaint concerning the introduction of "other crimes" evidence and the questioning and cross examination of Ronnie Folse who was a previous victim of the petitioner.

Evidentiary hearings on petitioner's post conviction claims were held on August 12, 2004 and October 20, 2004. Petitioner did not testify. Trial counsel and appellate counsel did testify.

A review of the opening statements shows the jury was informed by the State of the "other crimes" evidence which it intended to introduce (including the testimony of Ronnie Folse). The comments of both the prosecutor and defense counsel clearly reveal that the credibility of the victim and the "other crimes" witnesses was going to be a key issue as a result of these monetary settlements which had been reached with the Archdiocese. Argument was made that the alleged victims should not be believed due to their financial interest in these proceedings.

John Di Giulio testified on August 12, 2004 at the post conviction hearing concerning his representation of petitioner. He indicated that the credibility of the victim and "other crimes" witnesses in this case was crucial to the defense. He stated he was trying to show that the witnesses were not credible. He felt the financial interest of these prosecution witnesses as a result of monetary settlements with the Archdiocese showed they were not credible or believable. Further, contrary to the assertion of petitioner, it was made clear during the trial proceedings that the monetary settlements which had been reached with the victim and "other crimes" victims had been reached with the Archdiocese and not with the petitioner.

In addition to the issue of evidence concerning the monetary settlements with the victim and "other crimes" evidence witnesses, petitioner: also complained concerning defense counsel's conduct during the cross examination of Ronnie Folse.

Prior to the beginning of trial, the State of Louisiana gave notice of its intention to introduce "other crim.es" evidence. The State listed three (3) victims who would be called to testify. In the case for which petitioner was on trial, the State alleged petitioner committed the crime of anal intercourse with the victim K.P. while he was under twelve (12) years of age. The State alleged as "other crimes" evidence that petitioner had also engaged in anal intercourse with Ronnie Folse while he was a teenager/minor. A pre-trial hearing was held and testimony introduced concerning what "other crimes" evidence would be introduced. Defense counsel objected to the Court's ruling. A writ was taken which was subsequently denied by the First Circuit Court of Appeal.

A review of the testimony of defense counsel as well as the record of the pre-trial and trial proceeding shows how important it was to the defense to attack the credibility of the State's witnesses. The decision to attack credibility and the circumstances and manner in which the credibility of a witness is attacked are all within the ambit of trial strategy. The testimony of John DI Giulio clearly shows he was aware of the importance of the credibility and believability of these witnesses. He chose to question and/or cross examine regarding the monetary settlements with the victim and "other crimes" witnesses, including Ronnie Folse to show that there were other motives and/or relationships between these witnesses and petitioner that rendered their testimony not believable.

Ronnie Folse was called by the State to testify. His testimony, which had been ruled admissible, was that petitioner had committed a sexual act with him (Folse) identical to that for which petitioner was on trial. By eliciting testimony regarding the continuing relationship between petitioner and Folse after he became an adult, counsel hoped to discredit Folse's testimony. This was clearly a trial strategy employed by defense counsel.

The actions of which petitioner complains do not fall beneath the level of effective representation. These actions are all part of defense counsel's trial strategies. There has been absolutely no evidence that the outcome of the trial would have been any different had counsel not engaged in the conduct complained of. The defense was put on notice that the State would use other crimes evidence against the petitioner. Defense counsel was aware that the State would introduce the evidence: of anal intercourse with Ronnie Folse in an attempt to show and establish a pattern of conduct which also occurred with Kevin Portier. Defense counsel was under an obligation to in some way defend these allegations. The actions of defense counsel were clearly reasonable in trying to show that Portier's motive was monetary and he was thus not credible and should not be believed.

B. Appellate Counsel

After completion of all post trial motions, defendant appealed to the First Circuit Court of Appeal. Appellate counsel raised the following issues on appeal:

1. change of venue (p. 6-10 of appellate opinion);

2. challenges for cause of two (2) jurors (p. 10-12 of appellate opinion);

3. admission of hearsay evidence during the testimony of a medical expert (p. 12-17 of appellate opinion); and

4. motion for mistrial based on use of other crimes evidence and prosecutorial misconduct (p. 17-24 of appellate opinion),

Petitioner claims that the conduct of appellate counsel was deficient because he failed to raise as error the ruling by the trial court on the State's Prieur motion and also the failure of appellate counsel to raise the issue of sufficiency of evidence for review on appeal.

In pre-trial proceedings the State had given notice of its intention to use "other crimes" evidence. A Prieur healing was held. Defense counsel objected to the rulings of the trial court and writs were taken to the First Circuit Court of Appeal and subsequently denied (*State v. Melancon*, 96 KW 1115 (La. App. I Cir. 6/5/96).

During trial, defense counsel made motions for a mistrial on three (3) separate occasions in connection with the State use of "other crimes" evidence. The "other crimes" evidence issues were raised on appeal and considered in appellate court's opinion at pages 17 through 23. At page 22 the Court stated that the other acts of uncharged conduct tended to show petitioner's "lustful disposition" and pattern of committing sex crimes with minor boys. The Court found this evidence to be relevant and further found the probative value of this evidence outweighed its prejudicial effect.

Appellate counsel Edward Greenlee testified at the post conviction hearing held on August 18, 2004. Greenlee is an experienced appellate attorney. He testified he received the record, reviewed same, and called trial counsel concerning the record and various issues which had been addressed and heard at trial to consider which issues would be raise on appeal. He testified those issues which he felt had merit were raised. He was of the opinion that no issue which had merit had not been raised. He also testified that he did not leave out any issues because he may have disagreed with defense counsel as to the validity of raising these issues on appeal. Ultimately, he was of the opinion that as it related to raising the sufficiencyofevidence issue, this case came down to being a "credibility call" which the jury made. Because of the legal standard which is set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct, 2781 (1979), he did not raise the sufficiency of evidence issue as he felt it had no merit.

A review of the evidence which the jury heard also shows that there was sufficient evidence upon which a conviction could be returned. The jury considered the testimony of the victim, Kevin Portier; Dr. Guy Waguespack (Portier's doctor), who testified he treated the victim for rectal bleeding and rectal tear on March 10, 1988, which would have been consistent with the victim's version of petitioner's assault; Kevin Portier's mother, Debbie Portier, who testified that the victim had recurring rectal bleeding; and Jeffrey Heipel who verified that the victim had previously confided in Heipel that he had previously been sexually assaulted by petitioner. Finally, the jury had the consideration of the other climes evidence and that Ronnie Folse had been anally assaulted by petitioner as a minor child, thus establishing a pattern of conduct and a "lustful disposition" by petitioner. Considering this evidence and the other trial testimony, this claim has no merit. The actions of appellate counsel were reasonable considering the evidence and testimony. He reviewed the record, discussed evidence and issues with trial counsel, and raised those issues which he felt had merit.

II. DENIAL OF DUE PROCESS AND FAIR TRIAL

A. Insufficiency of (Evidence to Support a Verdict of Guilty of Aggravated Rape

The issue of insufficiency of evidence has been addressed in the previous argument concerning appellate counsel Edward Greelee. A review of the totality of the evidence clearly shows that petitioner has not met the required burden of proof regarding this issue for reasons previously cited.

B. The Prosecutors Demonstrated Animus

A review of the record of the First Circuit Court of Appeal decision at pages 23 and 24 shows that the issue of prosecutorial misconduct was raised on appeal and addressed by the First Circuit of Appeal. In its opinion the appellate court stated, "We have carefully reviewed the record in this matter and do not find that prosecutorial misconduct occurred." Petitioner has not carried the required burden of proof with respect to these issues.

C. The Adverse Publicity Surrounding the Trial

This issue was also raised on appeal in connection with petitioner's assignment of error concerning the denial of a motion to change Venue.

Considering the argument of counsel, evidence introduced, and previous decision of the First Circuit Court of Appeal, the Court finds petitioner has not made the required showing upon which post conviction relief can be based. The defendant has not shown that there was either actual or presumed prejudice to the degree that a fair trial was impossible. During the trial of the motion to change venue, defense counsel introduced evidence to support its motion. This evidence consisted of the testimony of expert witness Hartwell Doty, newspaper articles, and a video tape of a television, news report. A review of the voir dire testimony shows that great care was taken during the questioning of the prospective jurors for trial. The Court of Appeal (p. 6-9 appellate opinion) noted that it carefully examined the record before making its decision. The Court made an independent evaluation of the facts to determine if petitioner had received a fair trial. A finding was made that there was no actual or presumed prejudice shown by petitioner. The Court noted that after careful examination of the record, there was no showing that petition.er had been entitled to a change of venue. Accordingly, Petitioner has not carried the burden of proof with respect to this alleged claim.

In conclusion, a review of the pre-trial, trial, and appellate proceedings shows that petitioner was represented at all times by competent, zealous counsel who protected petitioner's rights at every stage of the proceedings. Defense counsel was placed in the difficult position of defending the accusations of a victim who was under the age of twelve at the time of the commission of the crime. Additionally, petitioner was confronted with "other crimes" evidence from three other witnesses, one of whom testified that petitioner had also engaged in anal sex. with him when he was a minor child. To further show the strength and validity of the "other crimes" evidence the court of appeal found that the State had proved that petitioner had "lustful disposition" toward children and that the evidence introduced was relevant and its probative value outweighed any prejudicial effect.

Defense counsel conducted pre-trial discovery and filed pre-trial motions which included motions to change venue and exclude "other crimes" evidence. Writs of review were filed with the First Circuit Court of Appeal seeking reversal of the trial court's rulings.

During voir dire defense counsel conducted a thorough examination of prospective jurors on issues pertinent to this case which included their knowledge of the case, pre-trial publicity, attitudes toward the Catholic Church, and whether they or other family members had been the victims of sexual abuse. Objections were raised and preserved for appeal relating to the denial of two defense counsel challenges for cause of prospective jurors.

Finally, at the conclusion of voir dire defense counsel again unsuccessfully argued to change venue.

In the State's opening statement to the jury it outlined the evidence it intended to introduce at trial, including the "other crimes" evidence. Defense counsel set the stage for its defense and trial strategy explaining to the jury the reasons the State would not be able to prove its case and the reasons the State's witnesses should not be believed.

A review of the trial testimony showed that both defense counsel participated in the questioning and cross examination of the State's witnesses. Objections were made and preserved for appellate review. Witnesses were thoroughly cross-examined in keeping with the defense objective of showing that the State's witnesses were not credible. The prosecution's case was subjected to meaningful adversarial testing.

During closing argument defense counsel thoroughly addressed the trial evidence and testimony, the reasons the State had not proved its case, and finally why the jury should not believe the victim and other witnesses.

It is very important to note that when the jury was instructed on the law two important limiting instructions were given by the Court. First, the jury was instructed that they were not to consider evidence of a civil suit for damages which would infer guilt of the defendant. Second, the jury was instructed that other crimes evidence was admissible for the limited purpose of showing interest, pattern, etc. and that defendant could not be convicted because he may have committed another crime.

After the jury returned its guilty verdict, defense counsel requested a polling of the jury votes. Prior to sentencing post trial motions were filed and argued.

After sentencing, appeal was taken to the First Circuit Court of Appeal. When the jury verdict was upheld, writs were filed and considered by the Louisiana Supreme Court. They were also denied.

Considering the totality of all trial and appellate proceedings, petitioner had the benefit of competent effective counsel who defended petitioner in a meaningful fashion while testing the State's case in an appropriate adversarial manner.

Petitioner has not shown that the performance of defense counse.1 was so deficient that he was denied the right to counsel. Further, petitioner has been unable to show that a reasonable probability exists that the outcome of the trial would have been different "but for" counsel's alleged errors. It is not enough for petitioner to show that alleged errors of counsel had some "conceivable" effect on the outcome of the case. Further, petitioner is not entitled to errorless counsel.

Finally, the fact that a particular tactic or strategy is unsuccessful does not establish ineffective assistance of counsel. The conduct of defense counsel during pre-trial and trial proceedings clearly falls within reasonable "trial strategy and tactics." Similarly, the decisions of appellate counsel as to the issues to be raised were also reasonable appellate strategy.

Again, there has been no showing that a reasonable probability exists that the outcome of the trial would have been different "but for" the alleged conduct of trial and appellate counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052; *State v. Williams*, 632 So.2d 351,361 (La. App. 1" Cir. 1.993), writ denied (La. 9/2/94),643 So.2d. 139; *State v. Folse*, 623 So.2d 59.71 (La. App. 1" Cir. 1993); and *State v. Moody*, 779 So.2d 4 (La. App. 1 Cit. 12/22/00).

Considering the reasons above, petitioner's claims for post conviction relief are denied.

Reasons rendered and signed this 26th day of July, 2006.

/s/ John R. Walker

JOHN R. WALKER
JUDGE, 32nd JUDICIAL DISTRICT

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